THE MYTH OF WARREN COURT ACTIVISM

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ABSTRACT

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Judicial activism and the Warren Court became synonymous, in the 1980's, with the rise of originalism. However, the first time the term, judicial activism, was employed it was applied to the Hughes Court. This thesis compares the two Courts to determine if the originalist labeling of the Warren Court as an activist court is appropriate. The evidence presented in this thesis demonstrates that judicial activism is a term that fails to capture the inherent complexities found in the interpretation of constitutional law when applied to either Court. It further suggests that originalism, as a jurisprudential theory, would be capable of producing the same type of results oriented decisions that originalists accused the Warren Court rendering.

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CHAPTER I

INTRODUCTION

During the twentieth century a term – judicial activism – emerged regarding the behavior of the Supreme Court which later entered the vernacular of politicians and common people alike. The term was first introduced and applied to the Hughes Court[1] after it struck down numerous pieces of New Deal legislation.[2] By the 1980's, the rise of high profile public figures[3] who advocated originalism[4] had made the term "judicial activism" synonymous with the Warren Court[5] and the Hughes Court – the original activist court – was forgotten in the public mind. However, the two courts were regarded as activist courts for completely different reasons. The Hughes Court was seen as an activist court because it struck down federal legislation that attempted to bring about the regulatory state. Whereas the Warren Court was viewed as an activist court because it overturned state legislation that resulted in discriminatory practices. When trying to discern whether or not an activist label is appropriate for the Warren Court it is, thus,

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[1] The Supreme Court under the tenure of Chief Justice Charles Hughes from 1930-1941.

[2] The New Deal was a series of federal programs that had been launched by the President Franklin Roosevelt and Congress in the hopes of bringing an end to the Great Depression.

[3] Such as Ronald Reagan, Edwin Meese and Robert Bork

[4] Originialism is a jurisprudential theory that describes how judges should interpret the Constitution. It was created in response to activist decisions that were rendered by the Warren Court. It includes original intent and original understanding and suggests that judges look to the Founders as a way to neutrally interpret the Constitution. Judicial activism and originalism are two distinct concepts. Judicial activism is not easily definable and it changes over time. One of the goals for this thesis is to create a definition. Originalists are scholars who subscribe to an originalist jurisprudence, as defined above, and who frequently accuse the Warren Court of committing judicial activism.

[5] The Supreme Court under the tenure of Chief Justice Earl Warren from 1953-1969.

right to ask if the Warren Court was an activist court in light of the differences that existed between it and the Hughes Court?

This thesis explores this question by using various legal decisions from each Court and other primary sources concerning originalism and judicial activism as well as contemporary scholarship to answer the question of how to most accurately label these two Courts. Furthermore, this thesis will show that the existing literature concerning judicial activism, either tries to define it, defend it, or criticize it, but none of these scholars have asked whether or not the label was appropriate as applied to the Warren Court. Finally, this thesis will examine the ironies associated with originalism in regards to its criticisms of the Warren Court and the ideas it advanced.

One of the major problems with judicial activism is that its definition is not static. Keenan D. Kmiec attempted to "clarify the meaning of 'judicial activism' when it is used in different contexts…"[6] Kmiec observed that it can be quiet confusing when determining whether or not a judicial activism label is appropriate for a decision rendered by any court because the meaning seems to change. Kmiec notes that it was, indeed, Schlesinger – in a Fortune magazine article – who coined the term judicial activism in reference to the Hughes Court in 1947. There was a fatal flaw in the article for while Schlesinger was the first person to use the term he "fail[ed] to define his terms with precision."[7] Kmiec argued that the term became much more common as the twentieth century progressed. When Kmiec wrote this article, in 2004, he observed that there were

[6] Kmiec, Keenan D. "The Origin and Current Meanings of "Judicial Activism"." *California Law Review*, 2004: 1448.
[7] *Ibid,* p. 1449

at least five different definitions of the word. According to Kmiec judicial activism can refer to "(1) invalidation of the arguably constitutional actions of other branches, (2) failure to adhere to precedent, (3) judicial 'legislation,' (4) departures from accepted interpretive methodology, and (5) result-oriented judging."[8] Kmiec concluded by stating, "Today, a charge of 'judicial activism' standing alone means little or nothing because the term has acquired so many distinct and even contradictory meanings."[9]

In this thesis, originalism also presented the same problem that judicial activism does because originalism is also a fluid concept. Keith Whittington asserted that originalism was born as a reactive philosophy to the decisions that were coming out of the Warren Court.[10] By the 1980's originalism had reached its heights with people such as Robert Bork, Edwin Meese and Raul Berger. However, the originalists at that time still had not developed any affirmative philosophy. In other words, they knew what they were against – the Warren Court – but they did not know what they stood for. The new orginialists, according to Whittington, are "less likely to emphasize a primary commitment to judicial restraint"[11] and are "focused less on the concrete intentions of individual drafters of the constitutional text than on the public meaning of the text that was adopted."[12] Did judicial activism change in the period of time between the publication of the Schlesinger article and the Warren Court?

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[8] *Ibid,* p. 1444
[9] *Ibid*, p. 1477
[10] Whittington, Keith. "The New Originalism." *Georgetown Journal of Law & Public Policy,* 2004: 109-119
[11] *Ibid,* p. 116
[12] *Ibid,* p.116

Thomas Keck, Alpheus Thomas Mason, and Robert Bork compared the Hughes and Warren Courts as well as each Court's resulting activism. In his work, Keck described concepts of liberal and conservative activism.[13] Keck wrote that conservative activists are most interested in policing the boundaries of government and ensuring a limited federal government, whereas, liberal activists are more concerned with protecting the rights and interests of groups that have historically not been protected by the electoral process while also upholding regulations and the welfare state both of which conceivably intrude upon the interest of the states and individuals. While both descriptions accurately describe the conservative Hughes Court and the liberal Warren Court, the same glaring omission from Arthur Schlesinger's 1947, Fortune magazine article, can also be found in Keck which is the failure to define judicial activism in a single term that is applicable across the ideological spectrum. In fairness, Keck was looking at what the Court did during the tenure of conservative and liberal chief justices, and how the balance of power concerning liberals and conservatives had the ability to increase or decrease activism. However, one is left to wonder precisely what judicial activism was and how it could be correctly applied.

Mason, like Keck, ascribed different characteristics of judicial activism to the Hughes and Warren Courts. While Mason did note a few examples of activist behavior from the Court before the New Deal, he saw the Hughes Court as the protector of private property and dual federalism; a process he described as "negative activism." The Warren

[13] Keck, Thomas M. *The Most Activist Supreme Court in History: The Road to Modern Judicial Conservatism.* Chicago: The University of Chicago Press, 2004.

Court, Mason asserted, ensured equal representation of the people and sought the protection of the individual from the government at all levels which was the very thing the Founders had intended it to do. Mason stated, "the judiciary has always been an instrument of government, actively involved in politics..."[14] Mason wrote, "Prior to 1937, the Justices fashioned around the 'due process' clauses and other constitutional provisions a penumbra of economic theory to defeat regulation of the economy. Chief Justice Warren's Court has embellished the Constitution, particularly the Bill of Rights and the fourteenth amendment, with political theory – the doctrine of egalitarianism – to protect and promote civil liberties."[15]

Bork reviewed the "increasing politicization of the Court[16]" from the founding of a federal judiciary to the Rehnquist Court. Bork viewed New Deal legislation as an attack on federalism and felt the Hughes Court was not completely wrong for invalidating legislation at the beginning of Franklin Roosevelt's first term as President. Bork characterized the Warren Court as "stand[ing] first and alone as a legislator of policy, whether the document it purported to apply was the Constitution or a statute."[17] Oddly, Bork thought that decisions such as *Brown v. Board of Education* and *Baker v. Carr* were the right decisions to make constitutionally, however, the reasons given for these decisions were on weak constitutional grounds. Other decisions rendered by the Warren Court, such as *Griswold v. Connecticut*, were labeled as value-voting decisions. It should

[14] Mason, Alpheus Thomas. "Judicial Activisim: Old and New." *Virginia Law Review*, 1969: 386.
[15] *Ibid*, p. 389
[16] Bork, Robert H. *The Tempting of America: The Political Seduction of the Law.* New York: Simon & Schuster, 1990. 12 .
[17] *Ibid*, p. 69

be noted that Bork accused both courts of value-voting. Concerning the Warren Court he wrote, "The Warren Court's philosophical thrust was… egalitarian and redistributionist.[18]" Bork was not as harsh towards the Hughes Court when he wrote, "The Supreme Court's behavior, its systematic frustration of the political branches, eventually erupted in a constitutional crisis. But the crisis arose less because the Court's behavior was illegitimate than because the judge-made values it protected suddenly went out of political and intellectual fashion."[19]

Leslie F. Goldstein and Jeremy Waldron criticized the concept of judicial review which is one of the definitions of judicial activism while Johnathan O'Neil defended originalism as a legitimate critique against the Warren Court. Goldstein's thesis was that there is a troubling trend in public law scholarship where scholars defend the practice of judicial review as long as it is done in the name of protecting fundamental rights that are not found nor implied within the text of the Constitution.[20] Goldstein likens these types of decisions to those of the Platonic Guardians. While there was a concession that the United States has a history of unwritten law, Goldstein insisted that a written Constitution exists for a reason – more specifically so that judges, at least Supreme Court Judges, do not wander off into the natural law realm.

Waldron attempted to show that judicial review is flawed in two ways. He argued, "First… there in no reason to suppose that rights are better protected by this

[18] *Ibid,* p. 84
[19] *Ibid,* p. 51
[20] Goldstein, Leslie F. "Judicial Review and Democratic Theory: Guardian Democracy vs. Representative Democracy." *The Western Political Science Quarterly,* 1987: 391-412.

practice (judicial review) than they would be by legislatures. Second… judicial review is democratically illegitimate."[21] Waldron based his critique of judicial review on four assumptions which were firstly that we live in a "society with democratic institutions in reasonably good working order.[22]" Second, we have "a set of judicial institutions… setup on a nonrepresentative basis… (to) uphold the rule of law."[23] Third, there was a commitment by "most members of the society and most of its officials to the idea of individual and minority rights."[24] Finally, there existed a "good faith disagreement about rights… among members of the society."[25] Waldron admitted that most of his work in this article was abstract and that it would be possible for some of these assumptions to fail if they were applied to concrete cases. He further admitted that if his assumptions fail his entire argument fails. However, Waldron insists that even if his argument fails there still might be other great arguments against judicial review that one should consider. Waldron concluded by stating that there may be some valid reasons for judicial review, however, judicial review on the basis of rights "is inappropriate (in) reasonably democratic societies whose main problem is not that their legislative institutions are dysfunctional but that their members disagree about rights."[26]

[21] Waldron, Jeremy. "The Core Case Against Judicial Review." *The Yale Law Journal,* 2006: 1346.
[22] *Ibid,* p.1360
[23] *Ibid,* p. 1360
[24] *Ibid,* p. 1360
[25] *Ibid*, p. 1360
[26] *Ibid,* p. 1406

Johnathan O'Neill contended that the Framer's intent, or historical intent, was always considered in constitutional interpretation before the twentieth century.[27] As the United States entered the twentieth century, the Supreme Court began to use a formalist approach to interpretation where the law became categorized but historical intent was not forgotten. After engaging legal realism and the notion of a living constitution, the Court entered a period where it used a process approach. The process approach can be characterized by the judiciary giving extreme deference to legislatures. The process approach is associated with the Hughes Court, the New Deal Court, after it ceased to render Roosevelt's New Deal legislation as unconstitutional. O'Neill argued that the process approach lasted from the time of the New Deal until the end of the Warren Court. However, after the Civil Rights decisions, rapidly increased incorporation of the Bill of Rights, and the Reapportionment Cases, process critics had emerged so that by the end of the Warren Court ideas of orginalism and textualism were blossoming into their own full-fledged Constitutional theories designed specifically to combat the perceived weakness of the constitutional reasoning of the Warren Court. This is why it is almost impossible to discuss the judicial activism of the Warren Court without also discussing originalism. The entire raison d'être for the nascence of originalism was to critique what conservatives viewed as the judicial activism of the Warren Court.

Jack N. Rakove contended that the case that is largely thought to be responsible for judicial review in American jurisprudence, *Marbury v. Madison*, was really nothing

[27] O'Neill, Johnathan. *Originalism in American Law and Politics: A Constitutional History.* Baltimore: The Johns Hopkins University Press, 2005.

more than an issue of federalism.[28] That is, the Supreme Court was not necessarily striking down legislation, rather, it was stopping one branch of government from encroaching upon another. While Rakove discussed the Marshall Court, his article does put the idea of judicial review into a different context, namely that scholars have asserted that the traditional role of the Court was to police the boundaries of government. During the New Deal, the Hughes Court viewed much of Roosevelt's legislation as an infringement of state's rights which was why, before 1937, the Court struck down most of the federal legislation. Additionally, the Court's cessation of policing boundaries did not occur until 1937 when the notion of legislative supremacy took root in constitutional law, before that judicial supremacy was almost absolute. However, the Warren Court changed everything because it was seen as doing something entirely different. The Warren Court was viewed as a super legislature that was allocating newly created rights to the people as it trampled on notions of legislative supremacy at the state level. Therefore, one is left to wonder how the Hughes Court can be viewed as an activist court once it is placed in the historical context concerning the role of the Court from the founding until that time period. Similarly, *if* it is true that the Warren Court deviated from the normative function of the Supreme Court and a standard of constitutional interpretation that had been historically employed, would it necessarily follow that it could be legitimately labeled as an activist Court?

[28] Rakove, Jack N. "The Origins of Judicial Review: A Plea for New Contexts." *Stanford Law Review*, 1997: 1031-1064.

Daniel Levin, Stephen Breyer, Jerome McCristal Culp, Jr., Martin Shapiro, Terri Jennings Perretti, David A Strauss, and H. Jefferson Powell do not address issues of judicial activism. Rather, they question the validity of originalism in regards to its concrete application. Levin wrote that originalists "seek to halt the historical transformation of the language and principles of the Constitution that occur in every generation… By returning to an origin myth of the Constitution featuring the document's ratification by the 'people,' these contemporary orginalists attempt to reconstruct American constitutionalism in a populist mode that casts liberal jurisprudence as essentially undemocratic."[29] Levin argued that originalists value heritage over history while defining heritage as a fixed idea that never changes. He wrote, "Heritage is anti-intellectual because it appeals more strongly to the experience of location and materiality than it does to the historical narrative itself."[30] Furthermore, our understanding of history is constantly changing as new interpretations emerge. Therefore, the originalist association of heritage is a denial of history rather than an embracement of it.

Breyer asserted that the Supreme Court is charged with interpreting and applying the Constitution in a concrete way that works with the understanding of American principles in the twenty first century unlike the originalists who, Breyer claims, would have American judges consult the eighteenth century views of the Founders in order to answer pertinent issues in today's society. Additionally, Breyer contended that it is not the job of a Justice to consult history when adjudicating, rather, it is the job of the Justice

[29] Levin, Daniel. "Federalists in the Attic: Original Intent, the Heritage Movement, and Democratic Theory." *Law & Society Inquiry*, 2004: 107.
[30] *Ibid,* p. 123

to take a pragmatic approach that "ecompas[es] efforts that consider and evaluate consequences."[31] Breyer asked, "If the Court is to decide major constitutional questions on the basis of history, then why not ask nine historians, rather than nine judges to provide those answers?"[32] Of course, Breyer's question leaves one to assume that the historical intent is not as important as originalists would have people believe.

Culp argued that "legal scholars, judges, and law students… approach question of law from a perspective that excludes back concerns."[33] Regarding originalism Culp wrote, "Most American's believe that because race is not mentioned, it cannot be a pivotal issue…[34] To rely on original intent is to hitch our interpretational scheme to a vision that excluded blacks."[35] Culp argued that there are four typical reasons that are used to justify original intent and its exclusion of the black perspective. First, while the Constitution was not perfect because it excluded women and minorities, it was eventually perfected to include all people. Second, there is no way to know what concessions blacks could have gotten at the Constitutional Convention even if they would have been allowed to participate. Third, "blacks had nothing to add to the process of defining American Citizenship."[36] Finally, the Constitution acts as a contract between the people and the government. If blacks "did not like this contract, (they) could have left the American

[31] Breyer, Stephen. *Making Our Democracy Work: A Judge's View.* New York: Vintage Books, 2010. 82.
[32] *Ibid,* p. 77
[33] Culp, Jr., Jerome McCristal. "Toward a Black Legal Scholarship: Race and Original Understandings." *Duke Law Journal,* 1991: 42.
[34] *Ibid,* p.67
[35] *Ibid,* p. 69
[36] *Ibid*, p. 72

republic."[37] Culp rejected all of these justifications and concluded that originalism requires "black concerns to defer to white concerns."[38] While Culp was dealing exclusively with black concerns, a larger question looms over originalists claims which is: why are the American people not at liberty to change the Constitution in a way that conforms to the norms of society in every generation given that so few people were even consulted in the creation and adoption of the Constitution in the first place?

Shapiro contended that "American politics has been Constitution-centered from the very beginning, and lawyers play a disproportionate role in political life."[39] Since American politics is "Constitution-centered" it is common to see the people and their politicians take political stands concerning judicial outcomes of important cases in any particular period which is what happened during the Progressive Era, the New Deal, and Civil Rights Movement. Shapiro did not deny that judicial review has become more common place in the twentieth century nor did he deny that it has actually expanded into the area of administrative law. However, Shapiro argues that an expansion of judicial review is actually a good thing for the American people because it forces their legislatures and bureaucracies to reconsider legislation or directives since they know it is possible for the courts to strike them down. Shapiro stated, "Juridicalization does not substitute judicial policy-making for legislative or administrative policy-making, or even

[37] *Ibid,* p. 73
[38] *Ibid*, p. 75
[39] Shapiro, Martin. "Juridicalization of Politics in the United States." *International Political Science Review,* 1994: 101.

provide judges with the last word in the policy process. It simply adds judges as another category in the broad and multifaceted array of policy makers."[40]

Peretti asserted that there is no clear meaning found in the text of the Constitution and that clarity is only found through opinions authored by Supreme Court Justices. Furthermore, value-voting is a manifestation of what the public wants and not necessarily a reflection of a judge's personal values. Peretti wrote, "Value-voting is not merely the arbitrary expression of a justice's idiosyncratic views. Rather, it is the expression and vindication of those political views deliberately 'planted' on the Court by an ideology-conscious and politically accountable president and Senate."[41] Peretti also rejected the idea that the legitimacy of the Court is threatened when judges employ value-voting. Citing numerous scholars, Peretti demonstrated that the public was more interested in the Court's decision than the process the Court used to make the decision.

Strauss rejected the notion that either originalism or textualism were the only plausible ways to restrict a judge's prerogative. Strauss contended that traditional common law contains better methods of judicial restraint because of the long standing tradition of legislative deference. Additionally, precedent is a foundation of both the common law and Anglo-American law which means ideas of origrinalism and textualism only work (or are only conservative) with the application of precedent. As Strauss pointed out, the equal protection clause gives judges a great deal of discretion if the judge simply looks at the text and ignores precedent concerning it. Furthermore, the common

[40] *Ibid,* p. 109
[41] Perretti, Terri Jennings. *In Defense of a Political Court.* Princeton: Princeton University Press, 2001. 133.

law does not require people in the twentieth century to adopt the ideas and beliefs of people in the eighteenth century. That is, judges are able to make incremental changes as society changes. Strauss concluded by writing, "Originalist and textualist approaches often find themselves in the position of making exceptions for, or apologizing for, or simply being unable to account for, some of the most prominent features of our constitutional order. The common law approach greatly reduces the need to do any of that. It forthrightly accepts, without apology, that we depart from past understandings, and that we are often creative in interpreting the text."[42]

Powell sought out "the historical validity of the claim that the 'interpretive intention' informing the Constitution was an expectation that future interpreters would seek the instrument's meaning in the intention of the delegates to 1787 Constitutional Convention in Philadelphia."[43] Powell made two points. First, he stated that originally the Constitution was seen a contract between the states and the federal government and not as, in contemporary times, a contract between the government and the people. Second, there had been a push that began in England, after the Protestant Reformation, which extended to the colonies and subsequently carried over into the founding of the American Republic, to get rid of unwritten traditions. Originalists, according to Powell, might rightly be able to make a claim in support of strong states' rights, however, they would not be able to support other notions that originalists claim to find in the Founders'

[42] Strauss, David A. "Common Law Constitutional Interpretation." *The University of Chicago Law Review,* 1996: 934-935.
[43] Powell, H. Jefferson. "The Original Understanding of Original Intent." *Harvard Law Review*, 1985: 886.

intentions, such as the absolute rights of property owners.[44] Powell concluded that it would be a mistake to assume that original intent meant the same thing in early nineteenth century America that it means today. Furthermore, the evidence is ambivalent concerning whether or not the Framers wanted contemporary Americans to interpret the Constitution based on their intent.

None of these scholars have addressed what judicial activism is or when it can be appropriately applied to the Supreme Court. Judicial activism, admittedly, has its own virtues and vices, but when should scholars, politicians, and society take it upon themselves to declare a Court as an activist court? Additionally, why have originalist scholars been able to unilaterally label the Warren Court as an activist while not being challenged over that label?[45] It should also be noted again that originalism was created after Earl Warren became Chief Justice in direct response to decisions his Court rendered. This is important because the activism of the Hughes and Warren Courts were different. The Warren Court was judged by a different standard than the Hughes Court. The Warren Court was not considered an activist court until it had already handed down several landmark cases. Originalists were able to look at what the Warren Court did and create a standard for judicial activism that just happen to coincide with decisions they did not like. Originalists then claimed that it was not their dislike of a decision that rendered it as activism, rather it was the deviation from the intentions of the Founding Fathers that

[44] This was one of the major contentions in the *Dred Scott* decision.

[45] There must be a distinction between criticism of the Court and a label of judicial activism placed on the Court. Many non-originalist scholars have criticized decisions of the Warren Court without calling it an activist court.

resulted in the just labeling of those decisions as judicial activism. The framework for judicial activism, as defined by originalists, came after – not before – controversial decisions of the Warren Court. In other words, originalists have been able to change the standard of judicial activism concerning the Warren Court in ways that have remained unchallenged.

In a broad sense, I again ask if it is appropriate to label the Warren Court as an "activist" court in light of the differences that existed between it and the Hughes Court? The activism produced by the Hughes and Warren Courts were markedly different in practice, yet they both similarly ran afoul of the then contemporary notion that judges should defer to legislatures. Thus, there is another question at play concerning the labeling of judicial activism which is: are abstract principles or the concrete consequences of a decision more important in labeling a court as an activist court? It is my contention, therefore, that the concrete application of the Constitution holds a higher standing than abstract notions regarding the method that ought to be used in interpreting the Constitution; furthermore, since the Warren Court applied the Constitution in very different ways than the Hughes Court did and because the Hughes Court set the threshold for judicial activism when it became the first court to be labeled as an activist court, the labeling of the Warren Court as an activist court is unwarranted, inappropriate, and ahistorical.

This thesis will consist of three additional chapters. The next chapter addresses the activism of the Hughes Court, and it is essentially divided into two sections. The first section deals with the Court overturning New Deal legislation since activism committed

by the Hughes Court is normally relegated to the economic sphere. The second section is concerned with decisions rendered by the Hughes Court that advanced civil liberties for all Americans and laid the foundation for decisions that would help advance the cause of civil rights for future courts. The third chapter addresses the Supreme Court under the tenure of Chief Justice Earl Warren. This chapter is divided into five sections. The first section gives some brief biographical information about Chief Justice Earl Warren. The next section examines some landmark decisions rendered by the Warren Court. The third section addresses the jurisprudence of originalism both its critique of the Warren Court and what it is conceptually. The final section looks to how an originalist interpretive method has historically hurt minorities in the United States and Earl Warren's explicit rejection of it. The last chapter, the conclusion, will discuss the findings of this thesis, the evolution of my research, and the implications this thesis will have for future research.

The sources used for the first section of the Hughes Court chapter were chosen to provide some historical background concerning the events leading up to and surrounding the New Deal decisions that were rendered by the Court – this includes both secondary and primary sources – as I was attempting to discern if there was any historically valid reason, other than activism, for the Court to overturn New Deal legislation. The second section of this chapter uses both primary and secondary sources to establish a trend line which demonstrates the Supreme Court was making advances in civil liberties well before Earl Warren became Chief Justice. This was a trend that needed to be shown

because the activism that the Warren Court is accused of tends to be relegated into a protectorate sphere of individual and civil rights as well as civil liberties.

The first two sections of chapter three use primary and secondary sources to discuss biographical information about Warren in the context of landmark decisions that were rendered under his tenure. The primary sources are Supreme Court cases which are needed for the case studies. An additional primary source, Earl Warren's memoirs, was chosen specifically to write about Warren in a personal way because he, unlike Hughes, was individually targeted along with the Court by critics. Section three basically uses primary sources regarding originalism. These sources also establish what originalism is conceptually and why it is unable to provide a valid jurisprudential theory to counter the actions of the Warren Court. The primary sources for this section were written by scholars who were instrumental in the creation of originalism, and since judicial activism is not a static term, their writings proved essential to combat their own conceptions of it. The final section of this chapter uses primary and secondary sources to chart the Supreme Court's understanding of its responsibility to either uphold or abolish a caste system in America and how a caste system might have remained in place if the Warren Court had used originalism when it rendered its decisions.

CHAPTER II

THE HUGHES COURT AND THE NEW DEAL

The conventional New Deal narrative states that, in 1932, during the Great Depression a charismatic leader was elected to the office of President of the United States. Once there, Franklin Roosevelt set out to fix the nation's economy with legislation that attempted to use constitutional powers in unprecedented ways. The Supreme Court acted as a barrier to progress and, consequently, was viewed as an obstruction to the will of the people when it struck down provisions of New Deal legislation on constitutional grounds. [46]

The traditional account of the New Deal regarding the *switch in time* is flawed and thus not able to render a completely accurate reason regarding why the Court seemingly went from overturning New Deal legislation to upholding it. Contemporary scholarship that questions not only the reasons for the *switch in time* but also the very notion of the *switch in time* itself unintentionally serves as a guide to the judicial

[46] Cushman, Barry. *Rethinking the New Deal Court.* New York: Oxford University Press, 1998.; Kalman, Laura. "The Constitution, the Supreme Court and the New Deal." *The American Historical Review,* 2005: 1052-1080.; White, G. Edward. *The Constitution and the New Deal.* Cambridge: Harvard University Press, 2000.

activism the Hughes Court was accused of committing.[47] However, the propagation of the conventional narrative does a disservice to the decisions the Hughes Court rendered during its tenure. This chapter will show that the only definitive explanation for both the Court's deferential stance on economic legislation and its increase in the expansion of civil liberties was Roosevelt's ability to finally make an appointment to the Supreme Court at the beginning of the 1937 term. This chapter will be divided into two sections. The first section will discuss the activism that is related to the New Deal legislation and the second will discuss civil liberty issues that were dealt with by the Hughes Court. This chapter concludes by pointing out flaws in the traditional characterization of judicial activism.[48]

[47] Essentially, the *switch in time* narrative implies that the United States had one Constitution before the *West Coast Hotel* and functionally operated under a different conception of the Constitution after the decision was rendered. Almost overnight, the Justices changed their minds concerning the scope of delegated powers found in the Constitution and ruled accordingly. If the conventional narrative is false then so too is the notion that the Court switched its method of constitutional interpretation immediately to serve the will of the people. The implication regarding judicial activism would be that the Hughes Court was not concerned with reaching a decision that pacified the public which would mean that institutional changes were the real culprit behind the Court's shift.

[48] It should be noted again that the purpose of this thesis is to dispel the notion of Warren Court activism. The Hughes Court is discussed because it was the first Court to be labeled as an activist court which means it is instrumental when trying to discover the evolution of judicial activism and discern when an activist label is appropriate. An originalist characterization of the Hughes Court is discussed in conjunction with Arthur Schlesinger's description of judicial activism because Schlesinger created the term "judicial activism" and orginialists took that term and applied it to the Warren Court. Therefore, it is important to see how originalists viewed the Hughes Court in comparison to the Warren Court. However, once the chapter shifts from contrasting the description of the Hughes Court and its activism to the legal decisions that caused the Court to be labeled as an activist court by Schlesinger, this chapter will cease to mention originalism. The reason for this cessation is because neither originalism nor originalists existed during the Hughes Court time period. As the previous chapter showed, originalism – in its current form – was created in response to the Warren Court.

In 1936, Roosevelt was re-elected by historic margins winning forty-seven out of forty-nine states and over sixty percent of the popular vote.[49] In February 1937, during the wake of his re-election victory, Roosevelt introduced a plan that was presented as a way to aid the older justices in their duties on the Court. Critics of the plan charged it was an attempt by Roosevelt to "pack" the Court with justices who would uphold the constitutionality of his legislation.[50]

In March 1937, the Supreme Court upheld a state minimum wage law for women, in *West Coast Hotel Co. v. Parrish,* which seemed to be a reversal from a decision the Court had rendered only a few months prior when it struck down a similar state minimum wage law, in *Morehead v. New York ex rel. Tipaldo*. Of great importance to the *West Coast Hotel* decision was the fact that Justice Owen Roberts changed his vote to uphold the state minimum wage law when only a few months before, he had voted against an almost seemingly identical law in *Morehead*. After *West Coast Hotel Co.,* during the final months of the term, the Court upheld the constitutionality of all the New Deal legislation that came before it. Subsequently, scholars noted that Justice Roberts switched from voting with the four conservative members on the Court in striking down New Deal legislation to upholding New Deal legislation reasoning that he had acquiesced to political pressure that had been incurred as a result of the 1936 presidential election

[49] Brinkley, Alan. "Chapter 24: The New Deal." In *American History Volume 2: From 1865: Fourteenth Edition,* 697. New York: McGraw Hill, 2012.

[50] The Judiciary Reform Bill of 1937, also known as Roosevelt's court packing plan, would have allowed Roosevelt to add an additional six Justices (one Justice for each Justice age seventy or older) to the Supreme Court.

and Roosevelt's court-packing plan in order to preserve the Supreme Court as an institution.[51]

In 1947, almost ten years after the switch in time, Schlesinger published an article in *Fortune* magazine which introduced the concept of "judicial activism" for the first time.[52] In 2004, Kmiec wrote of the article that "Schlesinger fails to define his terms with precision… Schlesinger never explains what characteristics would make a decision 'activist.'"[53] While it is true that Schlesinger did not explicitly define what activism was, one is able to infer the characteristics of an activist judge or activist court when understood through the paradigm of the Yale's thesis.[54] Schlesinger wrote:

> "The Yale's thesis, crudely put, is that any judge chooses his results and reasons backward. The resources of legal artifice, the ambiguity of precedents, the range of applicable doctrine, are all so extensive that in most cases in which there is a reasonable difference of opinion a judge can come out on either side without straining the fabric of legal logic. A naïve judge does this unconsciously and conceives himself to be an objective interpreter of the law. A wise judge knows that political choice is inevitable; he makes no false pretense of objectivity and consciously exercises the judicial power with an eye to social results… The Yale school believes that the liberal case against the 1936 Court was based on a false

[51] Cushman, pp. 3-4; White, p.16
[52] Kmiec, p. 1445
[53] *Ibid*, pp. 1449-1450
[54] Schlesinger does not define what he means by "Yale's thesis." However, one can infer by from the text that he is referring to an interpretive method, regarding the way judges reached conclusions in the decision making process, that was present at Yale's School of Law at least during the time this was written.

> and naïve issue. The proper criticism should have been, not that the old Court indulged in judicial legislation. The Court cannot escape politics: therefore, let it use its political power for wholesome social purposes. Conservative majorities in past courts have always legislated in the interests of business community: why should a liberal majority tie its hands by a policy of self-denial (self-restraint) that conservatism will never follow when it is in power?... Where the old Court (pre-switch in time) tended to strike down state and feral measures of liberal economic regulation and to sustain state and federal measures of personal regulation, the Black-Douglas (activist) group tends to sustain liberal economic regulation and strike down law affecting personal liberties… Black, for example, will invoke deference to the legislature when it does something he supports; or Frankfurter (a proponent of self-restraint) will strike down laws when such action is within the well-established limitation of the Court."[55]

From this segment, it is clear that Schlesinger thought activism – whether perpetrated by the Court or a judge – was something that conservatives and liberals did. Furthermore, activism is neither a positive nor negative thing. While Schlesinger preferred liberal activism to conservative activism, he thought it was simply a by-product of adjudication. It can also be deduced from this article that Schlesinger thought activism occurred when a judge or a court actively advanced a cause or ideology. If legislation supported the cause of an activist judge he would defer to it. Likewise, if legislation offends an advocate of self-restraint, he would render it unconstitutional. In essence, all courts and judges are

[55] Schlesinger, Jr., Arthur M. "Fortune." *The Supreme Court: 1947,* January 1947, 201-204.

activist. The only difference between an activist judge and a judge who purported to defer to legislatures was that the activist judge is cognizant enough of his power to use it for a cause he believed in, whereas, the self-restraint judge – unbeknownst to him – would ultimately do the same; he was just not smart enough to recognize it.

Bork disagreed with Schlesinger's cynical depiction of all judges as being political actors insofar as they reach their decision and then reason backwards. Even though Bork, who was instrumental in the formulation of originalism, disagreed with Schlesinger he wrote "Any lawyer or judge who is honest with himself knows that he often intuits a conclusion then goes to work to see if legal reasoning supports it. But the original intuition arises out of long familiarity with the structure and process of law."[56] One is forced to ask if there is any substantial difference between the characterization of the adjudication processes that are presented by Bork and Schlesinger.

In the 1980's, the nomination of Bork to the Supreme Court brought the ideas of originalism under close scrutiny. Schlesinger and Bork may have disagreed about what judicial activism was as well as its potential consequences in American democracy, however, it is clear both men agreed that the Hughes Court was fundamental in shaping the consciousness of the people regarding what can and should be defined as activism.[57] Furthermore, both men agreed that the *switch in time* of 1937 served as a watershed mark in constitutional law. For Schlesinger, the Supreme Court ceased the obstructionism

[56] Bork, p.71

[57] In the index of his book, Bork defines activism as "decisions not derived from the Constitution" which is, indeed, both vague and subjective; *Ibid*, p.424

which was preventing economic progress.[58] On the other hand, Bork observed that the Supreme Court simply abandoned the protection of federalism at that time.[59] While Whittington stated that originalism was born as a reactive philosophy to activism of the Warren Court,[60] Keck wrote, "(t)hough modern judicial conservatism has roots that reach back to the adoption of the original Constitution, its principal lines of development began with the founding moment of modern constitutional law, the New Deal 'switch in time' of 1937."[61]

New scholarship concerning the Supreme Court and New Deal legislation by Barry Cushman and G. Edward White has questioned the traditional narrative of the *switch in time*. White argued that institutionally, doctrinal changes had been altering the way the Supreme Court interpreted the Constitution from the beginning of the twentieth century. What occurred during the New Deal was simply an extension of the transpiring changes. In addition to doctrinal changes, administrative agencies and law had commenced and expanded prior to the New Deal.[62] Cushman, however, asserted that it was the evisceration of the public/private distinction in *Nebbia v. New York* that paved the way for the Supreme Court to eventually uphold the New Deal legislation. For Cushman, Justice Roberts ironically played a pivotal role in establishing the

[58] Schlesinger, Jr., "Fortune," p. 202

[59] Bork, pp.55-56; It should be noted that Bork argued that the Court began to stop protecting federalism with the *switch in time.* However, it was not until *Wickard v. Filburn* that the Court completely stopped protecting federalism.; White, pp. 225-233:White contends the real constitutional revolution came with *Wickard* when the Court abandoned formalist theory.

[60] Whittington, "The New Originalism," 101-119.

[61] Keck, p. 17

[62] Schiller, Reuel E. "The Era of Deference: Courts, Expertise and the Emergence of New Deal Administrative Law." *Michigan Law Review*, 2007: 399-444.

constitutionality of New Deal legislation not because of his *switch in time* vote rather it was because he wrote the majority opinion in *Nebbia.*[63] The notion that the *switch in time* narrative could be flawed has the potential of having serious consequences for scholars who are interested in studying both the history of the struggle between the President and Supreme Court during the New Deal and those who study judicial activism.

Economic Regulation and New Deal Legislation

Economic regulation during the New Deal can be divided into two distinct categories: State and Federal. The New Deal legislation was a series of acts passed by the United States Congress in an attempt to fix the devastating consequences of the Great Depression. While Congress was trying to find remedies for the economic realities the American people were facing, many states were also experimenting with new, innovative ways they could possibly provide relief to the citizens of their states. Shortly after Congress began passing its New Deal legislation, Constitutional challenges to some of the state laws began to find their way to the Supreme Court and Congress, along with the President, watched in anticipation as to how the Court might rule.

State Statutes

In 1934, the Supreme Court upheld the constitutionality of a law that had been passed in Minnesota during an effort to grant relief to its citizens who were facing foreclosures which had been increasing as a result of the Great Depression. One of the mortgage companies in Minnesota sued claiming that the law violated the Article I section 10, the contracts clause, as well as the due process and equal protection clauses of

[63] Cushman, p.225

the fourteenth amendment. When the Court issued its ruling in *Home Building & Loan Association v. Blaisdell*, Chief Justice Hughes, in a five to four decision, wrote for the majority that "The contract clause of the Federal Constitution is not a specific, particularized, absolute, or unqualified prohibition, to be read with literal exactness like a mathematical formula, although associated in the same section with more specific prohibitions, but is general, affording a broad outline and requiring construction to fill in the details."[64] Hughes further recognized that the statute was a "reasonable and valid exercise of the state's reserved power to protect the vital interests of the public during the emergency, and does not violate the contract clause of the Federal Constitution."[65] *Blaisdell* gave those who hoped the New Deal would withstand judicial scrutiny a sense of optimism because only two years earlier the Court had struck down an Oklahoma statute – which had been passed prior to the Great Depression – requiring ice sellers, manufactures or distributors to obtain a state permit. The Court, in this case, did not recognize the regulation of ice to any "such relation to the public as to warrant its inclusion in the category of businesses charged with a public use."[66] In *Blaisdell*, the Court seemed to be acknowledging the economic realities of the depression while realizing that it might be necessary to constitute emergency measures to provide relief to the people and fix the economic problems.

Later in 1934, the Court once again upheld a state statute that permitted New York to fix retail prices for milk. In *Nebbia v. New York*, the five to four majority – with

[64] *Home Building & Loan Association v. Blaisdell,* 290 U.S. 398 (1934)
[65] *Ibid*
[66] *New State Ice Co. v. Liebmann,* 285 U.S. 262 (1932)

the majority opinion written by Justice Roberts – ruled that the statute did not violate the equal protection or due process clauses of the Constitution. Roberts stated that "Under the American form of government the use of property and the making of contracts are normally matters of private and not of public concern. The general rule is that both shall be free of governmental interference. But neither property rights nor contract rights are absolute; for government cannot exist if the citizen may at will use his property to the detriment of his fellows, or exercise his freedom of contract to work them harm. Equally fundamental with the private right is that of the public to regulate it in the common interest."[67] Not only did Roberts further the concept that contracts were not absolute, in keeping with *Blaisdell*, he introduced the idea that businesses – long thought to be in the private sphere – could have an effect on the public at large, and – as such – this meant that the state could regulate them in order to protect the public.[68]

The optimism of those who believe in the New Deal was further sustained with *Nebbia*.[69] The same year *Nebbia* was decided, Alpheus Thomas Mason wrote an article where he asserted the Supreme Court had not abdicated in its duty to determine whether or not legislation was indeed constitutional. Mason contended:

> "It was not the provisions of the Constitution, not the foundations of the fathers, that were being overthrown in the recent Nebbia and Blaisdell cases but only the then dissenting view of what constitutes sound economic social policy… As

[67] *Nebbia v. New York,* 291 U.S. 502 (1934)
[68] Cushman, pp. 154-155
[69] Schlesinger, Jr., Arthur M. *The Age of Roosevelt: the Politics of Upheaval 1935-1936.* Boston: Houghton Mifflin Company, 1960: 254.; Mason, Alpheus Thomas. "Has the Supreme Court Abdicated." *The North American Review,* 1934: 353.

> Justice Roberts's opinion indicates, the court may relinquish for a time its self-made role as arbiter of State and national legislative policies, and this will be all to the good. But why think, as certain commentators do, that these 1934 decisions will make it difficult for the Court to recover the ground it has relinquished, or that judicial review will fall into innocuous desuetude?"[70]

In January 1936, a time when federal New Deal legislation was being struck down, Howard Lee McBain, who was the Ruggles Professor of Constitutional Law at Columbia University, argued with some – but not total – accuracy that both the Agricultural Adjustment Act and the Tennessee Valley Authority would be upheld.[71] In 2007, William G. Ross noted during 1930-1934 of Chief Justice Hughe's tenure "the Court was more deferential toward regulatory legislation than at any time since his previous tenure on the Court."[72]

Federal Statutes

In January 1935, the Court ruled that Title I of the National Industrial Recovery Act of 1933 was unconstitutional. The NIRA had allowed President Franklin Roosevelt to set forth regulations for the production of petroleum products at various phases. It further allowed him to prosecute those who had violated those regulations. In an eight to one decision – Justice Cardozo was the lone dissenter – the Court ruled, in *Panama*

[70] Mason, p. 360

[71] McBain, Howard Lee. "The Supreme Court and the States: Discussion." *Proceedings of the Academy of Political Science,* 1936: 58-61; The Agricultural Adjustment Act was later ruled unconstitutional in *United States v. Butler* and the constitutionality of the Tennessee Valley Authority was eventually upheld in *Ashwander v. Tennessee Valley Authority*.

[72] Ross, William G. *The Chief Justiceship of Charles Evans Hughes, 1930-1941.* Columbia: The University of South Carolina Press, 2007: 29.

Refining Co. v. Ryan, when Congress gave the president this power, it violated the non-delegation doctrine.[73] The Court asserted:

> "As to the transportation of oil production in excess of state permission, Congress had declared no policy, had established no standard, and had laid down no rule. There was no requirement or definition of circumstances and conditions in which the transportation of petroleum was to be allowed or prohibited. Furthermore, the Court found another objection to the validity of prohibition laid down by executive orders… in that the executive orders contained no finding or statement of the grounds of the President's action in enacting the prohibition."[74]

In other words, the language in the law was vague. At a press conference following the decision, President Roosevelt stated, "You and I know that in the long rung there may be half a dozen more court decisions before they get the correct language, before they get things straightened out according to correct constitutional methods."[75] One should note, however, that both Schlesinger and Malcolm Sharp contended that this was the first time the non-delegation doctrine had been invoked.[76]

A few weeks later the Roosevelt administration was relieved when the Court, in a

[73] *Panama Refining Co. v. Ryan,* 293 U.S. 388 (1935)
[74] *Ibid*
[75] Schlesinger, *The Age of Roosevelt: The Politics of Upheaval 1935-1936,* p.255
[76] Schlesinger, *The Age of Roosevelt: The Politics of Upheaval 1935-1936,* p. 281; Sharp, Malcom P. "Industry and the Court." *The University of Chicago Law Review,* 1935: 122-123.

series of cases collectively known as the Gold Clause Cases,[77] upheld, in a five to four decision, both the acts of Congress and an executive order which attempted to stabilize the banking system and currency.[78] These actions "voided the clauses in public and private bonds pledging redemption in gold; instead, all obligations were declared dischargeable in legal tender currency."[79] Bondholders saw a loss in their original investment and challenged the constitutionality of these acts. Had the Court overturned the acts "the public debt would (have) instantly increase(d) by $10 billion, and the total debt of the country, by nearly $70 billion."[80] Furthermore, Congress would have lost the ability to regulate currency.

In May 1935, the Court heard a challenge to the Railroad Retirement Act of 1934. Although this particular act was not part of the New Deal, Congress attempted to use the commerce clause to force railroad companies to provide pensions and disability insurance to their employees. In *Railroad Retirement Board v. Alton Railroad Co.*, the Court ruled – in a five to four decision – that Congress had overstepped its prescribed boundaries, regarding interstate commerce and, in the process of doing so, had unfairly deprived the railroad companies their right to due process. Justice Roberts delivered the opinion of the split Court:

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[77] *Norman v. Baltimore & Ohio Railroad Co.,* 294 U.S. 240 (1935); *United States v. Bankers Trust Co.,* 294 U.S. 240 (1935)*; Nortz v. United States,* 294 U.S. 317 (1935); *Perry v. United States,* 294 U.S. 330 (1935); In *Perry v. United States*, the Court did rule against the government, but it also ruled that the plaintiffs were not entitled to damages. Therefore, neither the federal government nor the New Deal suffered as a result of this decision.

[78] Schlesinger, *The Age of Roosevelt: The Politics of Upheaval 1935-1936,* pp.255-257

[79] Schlesinger, *The Age of Roosevelt: The Politics of Upheaval 1935-1936,* p.255

[80] Schlesinger, *The Age of Roosevelt: The Politics of Upheaval 1935-1936,* p.252

> "The federal government is one of enumerated powers; those not delegated to the United States by the Constitution, nor prohibited by it to the states, are reserved to the states or to the people. The Constitution is not a statute, but the supreme law of the land to which all statutes must conform, and the powers conferred upon the federal government are to be reasonably and fairly construed, with a view to effectuating their purposes. But recognition of this principle can not justify attempted exercise of a power clearly beyond the true purpose of the grant. *Const. art. I, § 8, cl. 3*, confers power on the Congress to regulate commerce among the several states; and that this power must be exercised in subjection to the guarantee of due process of law found in *U.S. Const. amend. V.*"[81]

Clearly, the Court did not seem to be in position to allow Congress to use its powers under interstate commerce in a broad way. One would have been wise to view this as a foreshadowing of events to come.

Some twenty-one days later, the Supreme Court unanimously ruled both the Frazier-Lemke Act and – once again – a portion of the National Industrial Recovery Act of 1933 were unconstitutional. In *Louisville Joint Stock Land Bank v. Radford,* the Court ruled that the mortgage moratorium in the Frazier-Lemke Act violated the Fifth Amendment by essentially not granting fair compensation in taking property.[82] In *Blaisdell,* Minnesota – in an economic emergency – temporarily allowed home buyers who had fallen behind to pay rent on their mortgages, however, this was not considered

[81] *Railroad Retirement Board v. Alton Railroad Co.,* 295 U.S. 330 (1935)
[82] *Louisville Joint Sock Land Bank v. Radford,* 295 U.S. 555 (1935)

to be a permanent solution. Furthermore, the Minnesota law did not affect the value of the mortgage. Conversely, the Frazier-Lemke Act essentially lowered the mortgage value of a home, to an occupant who had filed for bankruptcy, without compensating the holder of the mortgage for the difference in price. In *A.L.A. Schechter Poultry Corporation v. United States*, the Court again ruled that Congress had violated the non-delegation doctrine and exceeded its power under the Commerce Clause.

In January 1936, the Court held that provisions of the Agricultural Adjustment Act of 1933, which paid farmers with revenues collected from taxes not to grow certain crops with the hopes of increasing the prices, was unconstitutional. The AAA had derived its authority from the commerce clause. In *United States v. Butler*, Justice Roberts – delivering an opinion for a six to three majority – asserted that Congress did have the authority to collect taxes, however, there were some restrictions to this power. Of great interest, Roberts wrote, "The power conferred by *Article 1, 8, clause 1, of the Federal Constitution* to lay and spend taxes to provide for the general welfare of the United States, is not restricted to the enumerated legislative fields committed to Congress by the other provisions of the article, but confers a substantive power to tax and appropriate, limited only by the requirement that it shall be exercised to provide for the general welfare of the United States."[83] Ultimately, the act was unconstitutional because it violated the Tenth Amendment. Roberts declared, "The tax, the appropriation of the funds raised, and the direction for their disbursement, were possibly permissible means to

[83] *United States v. Butler,* 297 U.S. 1 (1936)

an unconstitutional end."[84] While the AAA was ruled unconstitutional, it is fascinating that the Court recognized that Congress did have the authority to provide for the general welfare and that authority extended beyond the written text of the Constitution.

Roosevelt eventually found success in the Supreme Court with the Tennessee Valley Authority. *Ashwander v. Tennessee Valley Authority* is a peculiar case. The Court, in a plurality opinion, ultimately decided that Congress was acting within its authority when it created the TVA thus avoiding the Constitutional issues that were presented by the plaintiffs in the case.[85] This might not have been the most resounding victory for the New Deal, but it was a victory nonetheless.

In May 1936, the Court ruled that Congress had exceeded its authority under the commerce clause in the Bituminous Coal Conservation Act of 1935. The act was not coercive and attempted to incentivize fair competition and labor practices among coal producers by providing substantial tax breaks. In *Carter v. Carter Coal Co.* – a five to three decision – the Court asserted that there existed a distinction between production and commerce and that production was something that occurred in local industry. As a result, it was out of the regulatory reach of Congress. Chief Justice Hughes agreed with this distinction and sided with the majority in that endeavor, however, he went on to declare that Congress's authority to regulate interstate commerce in order to produce fair

[84] *Ibid*
[85] *Ashwander v. Tennessee Valley Authority,* 297 U.S. 288 (1936)

competition was plenary.[86]

Approaching the "Switch in Time"

From 1930-1937, the Supreme Court overturned fourteen federal statutes.[87] Eleven of those fourteen were overturned in one term, 1935-1936.[88] One can easily understand why Roosevelt was willing to take what some considered extreme measures in order to ensure the viability of the New Deal.[89] In June 1936, the Court ruled – in a five to four decision – that a New York minimum wage law, which only applied to women, was unconstitutional.[90] In March 1937, in *West Coast Hotel v. Parrish*, the Court ruled – in another five to four decisions – that a Washington minimum wage law, which only applied to women and seemed to be identical to the New York law that had just been struck down, was constitutional.[91] While *West Coast Hotel* was a decision that effected state legislation, the Court went on to uphold the constitutionality of New Deal legislation in four cases before the end of the 1936-1937 term.[92] After the switch in time, the Supreme Court thwarted all remaining challenges to New Deal legislation and it was allowed to stand.[93]

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[86] *Carter v. Carter Coal Co.,* 298 U.S. 548 (1936)*;* With the exception of *Aswander v. Tennessee Valley Authority* and the *Gold Clause Cases*, these were the decisions that caused the Court to be labeled as an activist court. Therefore, it is imperative to discuss these cases in order to show the types of the decisions that warranted a judicial activism label.

[87] Keck, pp.40-41 (Table 2.1 and Table 2.2)

[88] Mason, "Judicial Activism: Old and New," 391.

[89] Pusey, Merlo J. *The Supreme Court Crisis.* New York: The Macmillan Company, 1937.

[90] *Morehead v. New York ex rel. Tipaldo,* 298 U.S. 337 (1936)

[91] *West Coast Hotel Co. v. Parrish,* 300 U.S. 379 (1937)

[92] *N.L.R.B. v. Jones & Laughlin Steel Corp.,* 301 U.S. 1 (1937)*; Carmichael v. Southern Coal & Coke Co.,* 301 U.S. 495 (1937)*; Chas. C. Steward Machine Co. v. Davis,* 301 U.S. 548 (1937)*; Helvering v. Davis,* 301 U.S. 613 (1937)

[93] Kalman, pp. 1052-1053

There are a few reasons why the conventional narrative, when applied to economic legislation and the *switch in time*, is flawed. First, Justice Roberts was a "swing voter" before *West Coast Hotel*. He voted with the majority in five to four decisions as well as with what one might call the liberal justices in *Blaisdell, Nebbia*, the Gold Clause Cases, and *Ashwander v. TVA*. All of these cases recognized the need for an expanded role in government. He did vote, in five to four decision, with the conservative members of the Court – and against the New Deal – in *Morehead, Railroad Retirement Board v. Alton Railway Co.*, and *Carter v. Carter Coal Co.* In *Schechter* and *Raford* the Court unanimously voted against the New Deal. Is it possible that some of the New Deal really was just bad legislation? Second, implicit in the *switch in time* narrative is the argument that the Court was divided ideologically and that a single justice switching his vote had major implications.[94] It has already been shown that in *Schechter* and *Radford* there was no ideological divide. Additionally, in *Panama Refining Co. v. Ryan*, Roberts voted with the eight to one majority and, in *United States v. Butler*, Roberts voted with the six to three majority. Both cases overturned provisions of the New Deal but the outcome of either case would not have changed if Roberts's vote would have been different. Furthermore, in two of the four cases decided after *West Coast Hotel*, the majorities that Roberts voted with were six to three[95] and seven to two.[96] Even in post-*switch in time* America, a single Justice changing his vote would not have made a difference. Finally, and probably the best evidence against the *switch in time* narrative,

[94] White, p. 31
[95] *Carmichael v. Southern Coal & Coke Co.,* 301 U.S. 495 (1937)
[96] *Helvering v. Davis,* 301 U.S. 613 (1937)

Justice Roberts wrote a memorandum explaining that not only was his vote not swayed by the court packing plan in *West Coast Hotel* but his decision in this case was given before Roosevelt even introduced the his plan. Furthermore, the reason he voted for the minimum wage law to prevail, in *West Coast Hotel*, where his vote had seemed markedly different in *Morehead* was because the counsel representing the defendant in *West Coast Hotel* had asked the Court to overrule the precedent governing minimum wage laws for women at that time whereas the counsel in *Morehead* had not done so.[97]

The Hughes Court has been regarded as an activist court because of the decisions it rendered before the *switch in time*. However, the section of this chapter shows many of the decisions that overturned New Deal legislation were not solely based on an ideological divide. In fact, in some of these cases there was no ideological divide present. Schlesinger's characterization of an activist Hughes Court rests on the notion that it was a conservative court protecting conservative interests such as property rights. The absence of an absolute ideological split, the presence of a swing voter, in Justice Roberts, and changing constitutional doctrines implies that there was no real judicial activism occurring on the Hughes Court in regards to economic regulation.

When a claim of judicial activism is made against the Court, inherent in that claim is the idea that the Court was only concerned with promoting a certain outcome.[98] The

[97] *Adkins v. Children's Hospital,* 261 U.S. 525 (1937); A minimum wage law in Washington D.C. that applied to women was found to be in violation of the due process clause of the Fifth Amendment insofar as it interfered with personal rights to contract.; Frankfurter, Felix. "Mr. Justice Roberts." *University of Pennsylvania Law Review,* 1955: 314-317.

[98] This is value-voting which was discussed in the previous chapter. This is true of Schlesinger and orginalism as well.

conventional *switch in time* narrative along with Schlesinger's depiction of an activist Hughes Court fails to recognize that the pre-*switch in time* Court found itself in a turbulent time in American history. What can really be seen as occurring during the Hughes Court was an internal struggle as to how the Court should react to legislation that was passed during a national emergency. While some members of the Court might have been concerned with preserving the status quo, it was certainly not all members. This was the whole reason Justice Roberts left the memorandum to Justice Frankfurter almost two decades after the *West Coast Hotel*. Justice Roberts wanted the readers of the memorandum to understand that he sought out the correct *interpretation* of the Constitution based on what was presented before the Court and not the correct *outcome.* In other words, his decisions were rendered based on how he interpreted cases that were presented to the Court and were not rendered based on an outcome he thought the Constitution ought to provide for.

Civil Liberties, Expansion of Criminal Procedure Protections,[99] and the Beginning of Civil Rights

As previously mentioned, Schlesinger regarded the pre-*switch in time* Court as one that had little regard for personal liberties whereas Bork characterized the *switch in time* as the Court moving from protecting economic liberties to – afterwards – protecting civil liberties. Either way, the implication is clear. Before 1937, the Court was not generally concerned about personal, non-economic freedoms. However, the Court had

[99] Expansion of due process for criminal defendants

already begun to turn its focus towards civil liberties before the tenure of the Hughes Court.

At the beginning of the twentieth century, prior to the Hughes Court, the Supreme Court acknowledged that there could be a relationship "between Fourteenth Amendment due process and the Bill of Rights…"[100] In 1923, the Court used the due process clause of the Fourteenth Amendment to strike down a "law that infringed on noneconomic liberties"[101] for the first time.[102] Two years later, the Court asserted, in *Gitlow v. New York*, that it "*Assumed*, for the purposes of the case, that freedom of speech and of the press are among the personal rights and liberties protected by the due process clause of the Fourteenth Amendment from impairment by the States."[103] Finally, in 1927, the Court used the due process clause of the Fourteenth Amendment to overturn "a conviction under Kansas's syndicalism statute… without mentioning freedom of speech or the press." [104] The Court also did not mention freedom of association, but its presence can be felt in the opinion.[105]

Freedom of Speech

The Hughes Court commenced its expansion of civil liberties, starting with the First Amendment's freedom of speech, almost from its inception. There were, at least, three incorporation cases regarding the First Amendment that can be attributed to the

[100] Ross, p. 174; *Twining v. New Jersey,* 310 U.S. 78 (1908)
[101] Ross, p.172
[102] *Meyer v. Nebraska,* 262 U.S. 390 (1923)
[103] *Gitlow v. New York,* 268 U.S. 652 (1925)
[104] Ross, p. 174
[105] *Fiske v. Kansas,* 274 U.S. 380 (1927)

Hughes Court. In 1931, the Court "… formally incorporated… the First Amendment's guaranty of freedom of the press"[106] with *Near v. Minnesota.* Six year later, in *DeJonge v. Oregon*, the Court incorporated the "fundamental constitutional rights of free speech and peaceable assembly… (under) the due process clause of the Fourteenth Amendment."[107] The last incorporation case to be presided over by the Hughes Court regarding the First Amendment was *Cantwell v. Connecticut* which used the due process clause of the Fourteenth Amendment to apply the free exercise of the religion clause to the states.[108]

While the incorporation cases are of the utmost importance, the Court was simultaneously showing its support for the First Amendment in other ways. In 1931, a conviction under a California statute, which banned the public display of red flags, was reversed because "it could be construed to prohibit peaceful and orderly opposition to government by legal means."[109] The majority opinion stated "the conception of liberty under the due process clause of the Fourteenth Amendment embraces freedom of speech."[110] The Court continued to overturn the convictions of people who had been prosecuted in violation of legislation by cities and various states. A conviction under a Georgia statute was voided because it violated the defendants "rights to free speech and assembly…"[111] Later, the Court further applied freedom of speech and assembly to the

[106] Ross, p. 175
[107] *DeJonge v. Oregon,* 299 U.S. 353 (1937)
[108] *Cantwell v. Connecticut,* 310 U.S. 106 (1940)
[109] *Stromberg v. California,* 283 U.S. 359 (1931)
[110] *Ibid*
[111] Ross, p. 190; *Hendon v. Lowry,* 301 U.S. 242 (1937)

states through the privileges and immunities clause of the Fourteenth Amendment.[112] The facts of labor disputes[113] and peaceful labor protests[114] were also shown to be protected speech.

Criminal Convictions and Juries

There were two important incorporation decisions originating from concerns over criminal protections that were rendered under the Hughes Court. In 1932, the Supreme Court effectively incorporated the Sixth Amendment's right to counsel in criminal cases through the due process clause of the Fourteenth Amendment with *Powell v. Alabama.* Five years later, in *Palko v. Connecticut,* the Court was asked to incorporate the Fifth Amendment's double jeopardy clause through the Privileges and Immunities clause of the Fourteenth Amendment. Ultimately, the Court declined to incorporate the Fifth Amendment, but it did state that the amendments could be selectively incorporated.[115] The next year, the Court ruled, in *Johnson v. Zerbst*, indigent criminal defendants in federal cases were required by the Sixth Amendment to be provided with counsel. While this was not an incorporation case, it shows that the Hughes Court was willing to enforce criminal protections at all levels.

In *Brown v. Mississippi*, the Court relied on a "general theory of due process"[116] to overturn the convictions of three people whose confessions were coerced.[117] This was

[112] *Hague v. Committee for Industrial Organization,* 307 U.S. 496 (1939)
[113] *Thornhill v. Alabama,* 310 U.S. 88 (1940)
[114] *Carlson v. California,* 310 U.S. 106 (1940)
[115] *Palko v. Connecticut,* 302 U.S. 319 (1937)
[116] Ross, p. 196
[117] *Brown v. Mississippi,* 297 U.S. 278 (1936)

the first time "the Court struck down a state criminal conviction on the basis of coerced confession."[118] Later, it explicitly used the due process clause of the Fourteenth Amendment to reverse the convictions of defendants who had been coerced.[119] The Court again relied on due process to later rule that confessions contained through coercion could not be used against the accused in capital cases.[120] In all cases mentioned here, when the Court overturned confessions based on coercion, the persons accused where African American men.

Another way states ensured guilty verdicts against blacks was to prohibit them from serving on juries. In 1935, the Court ruled that the equal protection clause of the Fourteenth Amendment prohibited the exclusion of African Americans from serving on juries solely on the basis of race.[121] In *Hale v. Kentucky,* "… the Court found a presumption of denial of equal protection insofar as no black had served on the local jury since at least 1960 and all members of the jury wheel were white even though seven hundred blacks were qualified for jury service."[122] The next year, a murder indictment against a black defendant was dismissed because no black person had served on a jury for forty years even though they comprised approximately half of the population.[123] Finally, in *Smith v. Texas,* the Court declared that the"…Fourteenth amendment prohibits… racial discrimination on grand juries in the selection of grand juries... If there has been

[118] Ross, p. 194
[119] *Chambers v. Florida,* 309 U.S. 277 (1940)
[120] *White v. Texas,* 310 U.S. 530 (1940)
[121] *Hollins v. Oklahoma,* 295 U.S. 394 (1935)
[122] Ross, pp. 210-211; *Hale v. Kentucky,* 303 U.S. 613 (1938)
[123] Ross, p. 211; *Pierre v. Louisiana,* 306 U.S. 354 (1939)

discrimination, whether accomplished ingeniously or ingenuously, the conviction cannot stand."[124] Ross has argued that the Hughes Court used due process in criminal proceedings to help expand rights of southern blacks who often found themselves at the mercy of a corrupt legal system.[125]

Voting

While not necessarily substantial, the Hughes Court also expanded voting rights in some minor ways. In 1932, the Court found that Texas state officials had violated the equal protection clause of the Fourteenth Amendment when they refused to allow African Americans to vote in the Democratic Primary.[126] Three years later, the Court ruled that political parties could prohibit blacks from primaries as long as it was not doing so because of state legislation.[127] An Oklahoma statute concerning voter registration was found to be in violation of the Fifteenth Amendment, due to its grandfather clause, and was rendered unconstitutional.[128]

Separate but Equal and the Protection of Minorities

Finally, the Hughes Court set precedents which would not only end segregation in schools but would also establish the Supreme Court as an institutional protector of minorities. In *Missouri ex rel. Gaines v. Canada*, the Court ruled that Missouri was obliged to provide its black citizens an education, in this case specifically a legal education, within its jurisdiction if it had also provided the same education to its white

[124] *Smith v. Texas,* 311 U.S. 128 (1940)
[125] Ross, p. 204
[126] *Nixon v. Condon,* 286 U.S. 73 (1932)
[127] *Grovey v. Townsend,* 295 U.S. 45 (1935)
[128] *Lane v. Wilson,* 307 U.S. 268 (1939)

citizens. Furthermore, if only one school existed to provide the education that was sought, the school could not segregate; it would be compelled to admit people from all races. Chief Justice Hughes, writing for the majority, asserted:

> "The equal protection of the laws is a pledge of the protection of equal laws. Manifestly, the obligation of the State to give the protection of equal laws can be performed only where its laws operate, that is, within its own jurisdiction. It is there that the equality of legal right must be maintained. That obligation is imposed by the United States Constitution upon the states severally as governmental entities -- each responsible for its own laws establishing the rights and duties of persons within its borders. It is an obligation the burden of which cannot be cast by one state upon another, and no state can be excused from performance by what another state may do or fail to do. That separate responsibility of each state within its own sphere is of the essence of statehood maintained under the dual system of government. It is impossible to conclude that what otherwise would be an unconstitutional discrimination, with respect to the legal right to the enjoyment of opportunities within the State, can be justified by requiring resort to opportunities elsewhere. That resort may mitigate the inconvenience of the discrimination but cannot serve to validate it."[129]

In this decision, Hughes is not overturning separate but equal, rather, he is enforcing it with two caveats. First, the Court is stating that in the absence of a separate facility

[129] *Missouri ex rel Gaines v. Canada,* 305 U.S. 337 (1938)*;* The Supreme Court also ruled the railroads must provide separate first class accommodations for black passengers even in the absence of market needs.; *McCabe v. Atchison,* 235 U.S. 151 (1914) and *Mitchell v. United States,* 313 U.S. 80 (1941)

within a state's jurisdiction, integration must occur. Second, and maybe more important, a shift seems to be occurring regarding the concept of separate but equal. It appears that separate **but** equal is transforming into separate **and** equal. The word "but" is exclusionary. Implicit in separate but equal is the notion that the state can segregate certain people – "those people" – from society so long as they were being sent to a facility that was equal to facilities in white society. However, "and" is an inclusive term that changes the status of minorities from being "those people" to becoming citizens.[130] In *Plessy v. Ferguson* the court made a distinction between social and political equality when it declared:

> "If the two races are to meet upon terms of social equality, it must be the result of natural affinities, a mutual appreciation of each other's merits, and a voluntary consent of individuals. This end can neither be accomplished nor promoted by laws that conflict with the general sentiment of the community upon whom they are designed to operate… Legislation is powerless to eradicate racial instincts or to abolish distinctions based upon physical differences, and the attempt to do so can only result in accentuating the difficulties of the present situation... If one race

[130] Hughes asserted that a state was responsible to provide equal opportunities to all individuals, however, he leaves no doubt that blacks are also citizens. While *Plessy v. Ferguson* acknowledged blacks as citizens, it asserted that the state only had to concern itself with "equality before the law". However, one is forced to ask if someone has equality before the law when it is the law that is separating citizens from each other. It should also be noted that the Court, in the majority opinion, characterized the Louisiana legislation that was being challenged in *Plessy v. Ferguson* as being "equal but separate." This is another important distinction to make because it shows that equality was thought to come first; separateness was second to equality. It was Justice Harlan's dissent which described the legislation, probably for what it really was, as separate but equal which, of course, meant that equality was an afterthought to the primacy of being separate.

be inferior to the other socially, the Constitution of the United States cannot put them upon the same plane."[131]

In other words, the Court, in 1896, was willing to indulge discriminatory acts passed by state legislatures as long as the discriminatory sentiment was shared by the public it represented. Conversely, in *Missouri ex rel. Gaines v. Canada,* which was decided over forty years after *Plessy,* the Court signaled that the state had an obligation to treat all of its citizens equally, with respect to access of facilities in its jurisdiction, regardless of public feelings on the subject.[132] One can also see the move from separate **but** equal to separate **and** equal in the social/political equality distinction. *Plessy* basically ruled that states could treat blacks as "politically equal" **but** "socially unequal" whereas Hughes contended that states had to treat blacks – regardless of citizenship – as "politically" **and** "socially equal."

Furthermore, *Plessy* did not define what the "equal" in separate but equal meant. Did it mean equality of safety? Equality of the number of seats in railroad cars? Equality of comfort? However, the Hughes Court pushed for equality of access. In requiring access to facilities the Hughes Court was also raising the idea of equality, in separate but equal, to a standard that would become increasingly difficult for the states to maintain.[133]

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[131] *Plessy v. Ferguson,* 163 U.S. 537 (1896)

[132] One could easily question the efficiency of *Missouri ex rel. Gaines v. Canada*. Before the Court rendered a verdict in this case, only five states sent black residents to other states for an education. By 1948, a decade after the Court had declared this practice unconstitutional, the number had increased to seventeen; Ross, p.217

[133] Ross, p. 217

The same year the Court decided *Missouri ex rel. Gaines v. Canada*, it also decided *United States v. Carolene Products Company*. *Carolene Products* is a decision that would have normally been relegated to the economic sphere of New Deal legislation had it not been for footnote four where the Court simultaneously deferred to the expansion of the regulatory state which derived its authority from the commerce clause but then stated that it would not necessarily be as deferential towards legislation that dealt with "discrete and insular minorities."[134] *Carolene Products* essentially set the precedent for the justification of expanding civil rights in cases that would come before the Supreme Court in later years.[135]

While it is true that the protection of civil liberties increased after the *switch in time*, to suggest that is it was not occurring before then is false. The pre-*switch in time* Court – the "conservative" court – was more protective of economic rights than civil liberties, but was expanding those liberties nonetheless. At the end of the 1936-1937 term, Justice VanDevanter – one of the conservative justices who had faithfully obstructed the New Deal – retired.[136] Roosevelt was able, at that time, to slowly start to remake the Court in a way that would be more deferential, so that by 1941, Roosevelt had

[134] *United States v. Carolene Products Co*., 304 U.S. 144 (1938)

[135] Cover, Robert M. "The Origins of Judicial Activism in the Protection of Minorities." *The Yale Law Journal,* 1982: 1287-1316.

[136] Kalman argued that the retirement of Justice Van Devanter could have been induced by the court packing plan, so that even if the court packing plan did not cause the *switch in time*, it was still successful because it persuaded Van Devanter to retire.

replaced all of the Four Horsemen.[137] This resulted in a Supreme Court that was more deferential to Congress, in regards to national legislation, and less deferential towards state legislation which is evidenced by the fact that from 1938 to 1953 the Court only overturned three federal laws while overturning 108 state laws.[138]

[137] The Four Horsemen were conservative Justices Van Devanter, Sutherland, McReynolds and Butler. They were frequently credited with obstructing the New Deal. However, this chapter has suggested that, at times, they were not the only barriers to the New Deal. Furthermore, after the *switch in time*, during the end of the 1936-1937 term, some of the Four Horsemen crossed ideological lines and votes with the majority – which included Justice Roberts – to uphold provision of some New Deal legislation.; Cushman, p. 208; Bork, p.56; Bork conceded that there could be problems with the *switch in time* narrative, but argued that – in the end – the conservative Justices lost their battle with the New Deal because of their own mortality.

[138] Keck, pp. 40-41; Table 2.1 and Table 2.2

CHAPTER III

THE WARREN COURT, JUDICIAL ACTIVISM AND ORIGINALISM

The judicial activism at issue with the Hughes Court dealt with the Court continuously holding that the regulatory state was unconstitutional. In other words, the Hughes Court was considered an activist court because it sided with business interests and against the government in the its quest to bring about economic progress. However, the Warren Court was perceived as an activist court for a completely different reason and, unlike the New Deal – Hughes – Court, the Chief Justice himself was personally targeted for criticism.

Almost immediately, the Warren Court faced criticism over its decisions because of its use of the Fourteenth Amendment to end discriminatory practices that were conducted by the various states; thus, enlarging civil rights and civil liberties protections in the midst of the Civil Rights Movement.[139] Additionally, some scholars – fearing an unconstrained Supreme Court – began a search for "neutral principles" that could serve as a guide when the Court was determining who was worthy of its protection.[140] Out of this search for neutral principles, originalism emerged.

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[139] Bork, p.73; Bork does not mention the Civil Rights Movement though he does designate the use of the Fourteenth Amendment in the expansion of civil liberties as the cause of judicial activism concerning the Warren Court.

[140] Wechsler, Herbert. "Toward Neutral Principles of Constitutional Law." *Harvard Law Review,* 1959: 1-35.; O'Neill, Johnathan. "Shaping Modern Constitutional Theory: Bickel and Bork Confront the Warren Court." *The Review of Politics,* 2003: 325-351.

Originalism was a critic of the Warren Court and eventually provided a counter method of jurisprudential interpretation.[141] Originalist critics charged that the Warren Court's method of jurisprudential interpretation was concerned with creating desirable or preferred outcomes.[142] Essentially, originalists declared that the Supreme Court should have been more concerned with the *process* of interpretation rather than the *outcome* of interpretation.

Earl Warren and his court were not activists for expanding protections of the Bill of Rights through the Fourteenth Amendment because this was a practice that had commenced before Warren's tenure as Chief Justice. Furthermore, the notion that originalism could fix the problems of constitutional interpretation Warren's critics claim were present during the Warren Court is a misnomer because originalism has the potential to produce decisions that create desired outcomes as well.[143] This chapter will discuss the events in Earl Warren's life that led to his nomination as Chief Justice of the Supreme Court and landmark cases that were heard during his tenure. It will then look at the way in which originalism has critiqued the Warren Court as well as its potential as a jurisprudential theory and the problems associated with it. This chapter will conclude by revealing that notions of equality and fairness in the United States would be much

[141] Whittington, "The New Originalism," *101-119.*; Bork, p. 143-160.

[142] This was Schlesinger's characterization of judicial activism. However, he described activism as a by-product of adjudication and not as something that was done with malicious intent which is how originalists describe it.

[143] Originalists argued that the Warren Court substituted their own policy preferences at either the expense of democratic majorities at the state level – hence the obsession with federalism – or principles established in the Constitution by the Founders. These ideas will be discussed later in this chapter.

different today had Warren employed an originalist interpretive method while Chief Justice.

Public Life before the Supreme Court

Earl Warren had many public roles. He worked for the Judiciary Committee in the California state legislature. He was elected and served California as a District Attorney, Attorney General, and – his last position as a publicly elected official – Governor. Arguably, his most notable role in American history was served as Chief Justice of the Supreme Court of the United States.

In 1948, Warren ran as the Republican Vice-Presidential Candidate with New York Governor Thomas Dewey. That year, President Truman won re-election. When Warren went back to California, he found that his presidential campaign offices had closed "two weeks before the election."[144] When Warren asked why the California campaign staff had chosen to close the offices, before the election, he was told, "there was nothing to fight… the Democrats had no campaign organization… and the Republicans would not contribute any more money toward a foregone conclusion."[145]

In 1950, Warren ran for and won a third term as governor. In 1952, Warren announced he would seek the Republic nomination for the office of the presidency. Warren ceased his campaign for the nomination during the convention when it became

[144] Warren, Earl. *The Memoirs of Chief Justice Earl Warren.* Garden City, NY: Doubleday & Company, Inc., 1977:241-242.
[145] *Ibid, p.* 243

apparent that General Dwight Eisenhower would win. Warren congratulated Eisenhower and returned to California.[146]

Eisenhower went on to win the presidency that year. Before his inauguration, in December 1952, Eisenhower called Warren to inform him that he did not have a cabinet position available for him. Warren told Eisenhower that was fine as he did not want a cabinet position. Eisenhower then personally committed to offering Warren "the first vacancy on the Supreme Court."[147]

On December 9, 1952, with Chief Justice Fred Vinson presiding, the Supreme Court heard oral arguments in *Brown v. Board of Education of Topeka et al*.[148] South Carolina, Delaware and Virginia had similar segregation laws that forbade integrated schools on the basis of race. The petitioners claimed that "segregation… in public schools… solely on the basis of race" denied African American children "equal protection of the laws guaranteed by the Fourteenth Amendment..."[149]

When the Justices were first able to discuss the case on December 13, 1952, Vinson signaled that he was not ready to overturn *Plessy v. Ferguson*.[150] As deliberations continued among the Justices, it became clear that there was a good chance *Brown* would be a five to four decision with Justices Black, Douglas, Burton, Minton, and Frankfurter wanting to overturn *Plessy* and Justices Vinson, Reed, Jackson, and Clark wanting to

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[146] *Ibid*, pp. 249-254
[147] *Ibid*, p.260
[148] *Brown v. Board of Education*, 347 U.S. 483 (1954)
[149] *Ibid*
[150] Schwartz, Bernard. *Super Chief: Earl Warren and His Supreme Court – A Judicial Biography.* New York: New York University Press, 1983: 74.

uphold *Plessy*.[151] The Justices knew, in a case as controversial as this, a five to four decision would have been devastating for the country.

Justice Frankfurter moved to have the cases reargued in the 1953 term which began in October. Frankfurter hoped that, with some additional time, the Justices who were presently dissenting might change their minds.[152] In September 1953, Chief Justice Vinson died. Justice Frankfurter reportedly told his law clerks, "This is the first indication that I have ever had that there is a God."[153] President Eisenhower – true to his word – nominated Earl Warren to proceed Vinson.

Earl Warren as Chief Justice

Racial Discrimination

On December 8, 1953, the Court reheard oral arguments.[154] After oral arguments were finished, the Justices met to informally discuss *Brown* without taking any votes. They decided that they would make a ruling in the case that term, but the vote was still not unanimous. The Justices decided to reconvene at a later date so they could have some time to work out any issues or concerns they had.[155]

At noon on May 17, 1954, Chief Justice Earl Warren read the Court's opinion from the bench. In his rather short opinion, Warren emphasized that it was impossible to "turn the clock back to 1868 when the amendment was adopted or even to 1896 when

[151] *Ibid*, p.77
[152] *Ibid*, p.78
[153] *Ibid*, p.72
[154] *Brown v. Board of Education*
[155] Schwartz, p.85

Plessy v. Ferguson was written."[156] He additionally declared that the constitutionality of school segregation came down to a single question. "Does segregation of children in public schools solely on the basis of race, even though the physical facilities and other 'tangible' factors may be equal, deprive the children of the minority group of equal educational opportunities?"[157] The Chief Justice answered, "We believe it does."[158] *Brown* unanimously ruled that segregation in public schools, on the basis of race alone, was unconstitutional because it violated the equal protection clause of the Fourteenth Amendment.

While *Brown* was decided narrowly,[159] the Warren Court struck down "every segregation law challenged before it.[160]" In his memoirs, Warren wrote that the *Brown* decision was the beginning of the term "The Warren Court."[161]

Socio-Economic Discrimination

In the 1961 term, Warren's new law clerks had been instructed by his outgoing law clerks to look for a case that involved a person's right to counsel because "The Chief feels strongly that the Constitution requires a lawyer"[162] in criminal cases. During the 1962 term, the Chief Justice would have his wish granted. On January 8, 1962, the law clerks found a petition from a man by the name of Clarence Gideon.[163]

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[156] *Brown v. Board of Education*
[157] *Ibid*
[158] *Ibid*
[159] *Brown* only applied to public education.
[160] Schwartz, p.126
[161] Warren, p.4
[162] Schwartz, p.458
[163] Ibid, p.458

Gideon had been convicted in Florida of a felony. At his trial he, Gideon argued that the Sixth Amendment ensured his right to have counsel represent him, though he could not afford it. Gideon was technically wrong. In 1942, the Supreme Court had ruled, in *Betts v. Brady*, that unless an indigent defendant could show a "special circumstance" that would prevent the defendant from obtaining a fair trial in a noncapital case, the state was not bound to provide counsel.[164] Since Gideon's case was not a capital case, he was denied counsel.

Eight of the Justices granted Gideon's petition for certiorari with Justice Clark declining. Before Gideon's case was tried in the Supreme Court, he wrote to the Court with an additional request. Gideon wanted competent counsel to represent him before the highest court in the land. The Justices acquiesced to this request and asked Abe Fortas, who would soon join the Court, if he would represent Gideon. Fortas agreed, and the case was argued on January 15, 1963.[165]

On March 18, 1963, Justice Black announced the Court's unanimous opinion, an opinion which he had authored. There was significance in the fact that Justice Black had been chosen to write the opinion in this case. He wrote the dissent in *Betts v. Brady*.[166] The Court ruled that Gideon's Sixth Amendment rights had been violated. Indigent defendants did have the right to counsel in criminal cases. Justice Black wrote, "…lawyers in criminal courts are necessities, not luxuries. The right of one charged with

[164] *Ibid*, p.458: *Betts v. Brady*, 316 U.S. 455 (1942)
[165] *Ibid*, p.459
[166] *Ibid*, p.460

crime to counsel may not be deemed fundamental and essential to fair trials in some countries, but it is in ours."[167]

While *Gideon* made it clear that defendants had a constitutional right to counsel in criminal proceedings, there still remained an important question in Constitutional Law. "When does the right to counsel begin?"[168] Furthermore, how could an accused person exercise their Fifth Amendment right if he was not aware that such a right existed?[169] During the 1965 term, the Court sought to answer these questions in *Miranda v. Arizona*.

During oral arguments, Warren pointed out that most states already had clauses in their constitutions that protected people from self incrimination.[170] In his memoirs, Warren contended that poor people were disproportionately affected by not knowing they had a right to counsel, due to *Gideon,* as well as a right not to incriminate themselves. The Chief Justice postulated that wealthy people would, after being accused of a crime, hire an attorney to handle their affairs since they could afford one. Furthermore, career criminals *knew* their rights.[171]

The Federal Bureau of Investigation already had a process to warn those who were being interrogated. Why should the states not be required to follow the same standard? Finally, Warren was somewhat appalled by the fact that the states did not give

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[167] *Gideon v. Wainwright*, 372 U.S. 335 (1963); As a district attorney, Warren was successfully able to write into the county charter "a provision for a public defender to represent all indigent defendants." He also aided in the establishment of a Legal Aid Bureau in Oakland, California, by personally paying for some of its expenses to represent poor people in civil matters.; Newton, Jim. *Justice for All*. New York: Riverhead Books, 2006: 12; *Johnson v. Zerbst*, the case which extended a right to counsel in federal cases and was decided by the Hughes Court, was cited as precedent for *Gideon.*

[168] Schwartz, p.588

[169] The particular right in question was the right not to self incriminate.

[170] *Ibid*, p.588

[171] Warren, pp. 316-317

these warnings anyway since he had instructed his staff to give the warnings when he was the district attorney.[172]

On June 13, 1966, the Court gave its decision which had been written by Justice Brennan[173] and was delivered by Chief Justice Warren.[174] In the five to four decision, the Justices ruled that "At the outset, if a person in custody is to be subjected to interrogation, he must first be informed in clear and unequivocal terms that he has the right to remain silent… The Fifth Amendment privilege is so fundamental to our system of constitutional rule, and the expedient of giving an adequate warning as to the availability of the privilege so simple, we will not pause to inquire in individual cases whether the defendant was aware of his rights without a warning being given."[175] Thus, Miranda's Fifth Amendment right against self incrimination had been violated. His conviction was overturned but, more importantly, this decision required the police, or their agents, to inform accused people of their constitutional rights to remain silent and have counsel when they were being arrested.

When Hughes was Chief Justice, the Court extended criminal protection procedures as a way to try to stop civil rights abuses that were happening in the south. This is why many of the convictions overturned during the Hughes Court involved African American men and southern states. However, the Warren Court understood that abuses in the criminal justice system extended to all poor people regardless of race or

[172] Schwartz, 589
[173] *Ibid*, 595
[174] *Miranda v. Arizona*, 384 U.S. 436 (1966)
[175] *Ibid*

ethnicity. In both *Gideon* and *Miranda*, the Court recognized that the criminal justice system would take advantage of someone based on indigence if the Court allowed it. Therefore, landmark decisions that extended protection to people in the criminal justice system, under Warren, are better understood through a lens that recognizes poverty as one of many ways states will discriminate against their citizens.

In *Shapiro v. Thompson* the Warren Court essentially forbade state governments from denying services or funds to poor people based on residency requirements.[176] This case is not typically regarded to the level of the Court's other landmark cases, however, it is still worth mentioning because it demonstrated that the Court was not willing to allow the indigence of an individual to be the basis of discrimination in criminal or civil law. While the Court was willing to rule that indigent defendants had a right to counsel, it never ruled that indigent people had a right to welfare.[177] The Court simply ruled that if a state was giving welfare benefits, it could not use the length of residency as a basis for discrimination.

Mal-Apportionment

In 1962, the Court ruled, in *Baker v. Carr*,[178] that the Congressional Districts in the United States House of Representatives had to be equal in population. Warren wrote that he thought this was "the most important case of my tenure on the Court."[179] While

[176] *Shapiro v. Thompson,* 394 U.S. 618 (1969)
[177] Bussiere, Elizabeth. "The Failure of Constitutional Welfare Rights in the Warren Court." *Political Science Quarterly,* 1994: 105-131.
[178] *Baker v. Carr,* 369 U.S. 186 (1962)
[179] Warren, p.306

the Court had asserted its belief that Congressional Districts at the federal level should be equal, there was a principle that had yet to be developed.

On November 22, 1963, the Supreme Court was in conference. The discussion centered on a series of mal-apportionment cases regarding state legislatures. Warren had just assigned himself the duty of writing the majority opinion when the Court heard of President Kennedy's assassination.[180] The opinion Warren had assigned to himself on that fateful day was for *Reynolds v. Sims*. *Reynolds* originated in Alabama and called into question the constitutionality of the state's apportionment scheme for its own legislature. Of course, *Reynolds* was not the only mal-apportioned state case the Court had to deal with that term. There were five other states involved which were Colorado, Maryland, Delaware, Virginia, and New York. Warren was concerned that it may appear as though the Court had an ongoing campaign against the South if he chose *Reynolds* as the main case. In the end, the Chief Justice decided that the *Reynolds* case was void of the complexities that plagued the cases from the other states. *Reynolds* could be used to articulate a simple, comprehensive equal apportionment scheme.[181]

In an eight to one decision, with Justice Harlan dissenting, the Court ruled that Alabama had violated the equal protection clause of the Fourteenth Amendment when it failed to base its representation on the population.[182] *Reynolds* went further than *Baker* in

[180] Schwartz, p.503
[181] *Ibid*, p.504
[182] *Reynolds v. Sims*, 377 U.S. 533 (1964)

determining that both houses of the state legislature had to be based on population, unlike the federal model.[183]

In his opinion, Warren wrote, "Legislators represent people, not trees or acres. Legislators are elected by voters, not farms or cities or economic interests."[184] However, the most important principle articulated in *Reynolds* was "one person, one vote."[185] The principle of "one person, one vote" finished the work *Baker* started.

Unenumerated Rights[186]

During the 1964 term, the Court heard arguments for *Griswold v. Connecticut*. Estelle Griswold was the director of a Planned Parenthood clinic in Connecticut. She was arrested and convicted after a doctor working at the clinic, who was also arrested and convicted, prescribed contraception and advised married couples concerning the best ways to prevent pregnancy. This practice violated Connecticut's birth control law. Griswold appealed her conviction to the United States Supreme Court where all nine of the Justices voted to grant certiorari.[187]

Griswold had argued that the law had violated her First Amendment right regarding the freedom of association, however some Justices – Black and Stewart – disagreed with Griswold's argument. Warren assigned the majority opinion to Justice

[183] Schwartz, p.505
[184] *Reynolds v. Sims*
[185] *Reynolds v. Sims*
[186] Ninth Amendment references rights that are not expressly listed in the Constitution.
[187] Schwartz, p.577

Douglas because he thought Douglas "had expressed the clearest theory upon which the Connecticut law might be invalidated"[188] which stressed the right of association.

Justice Brennan, who had intended to write his own concurring opinion, suggested that Douglas make his opinion broader. Brennan thought the Court should declare that the Bill of Rights guaranteed a right of privacy. When Douglas added Brennan's suggestion, Brennan decided not to write his own concurring opinion. Warren was concerned because he had desired a narrow opinion in this case, so he joined Justice Goldberg's concurring opinion.[189]

When Warren withdrew his support for the Douglas opinion, it left the *Griswold* decision in limbo. A majority of the justices had determined the Connecticut law was unconstitutional, however, they were not able to reach a majority regarding a constitutional interpretation that would strike down the law. In other words, the Court had reached a plurality decision. The Chief Justice knew that if a majority could not agree upon the same legal basis for overturning the law, it would leave confusion to the *Griswold* decision. Therefore, Warren ultimately decided to rejoin the Douglas opinion.[190]

On June 7, 1965, the Court issued a majority decision overturning the Connecticut law. The Court infamously declared "that specific guarantees in the Bill of Rights have penumbras, formed by emanations from those guarantees that help give them life and

[188] *Ibid*, p. 577-578
[189] *Ibid*, p.580
[190] *Ibid*, p.580

substance."[191] In essence, the Court ruled certain basic rights, such as the right to privacy, existed in the Constitution even if they cannot be found there verbatim. During the same 1964 – 1965 term, the Chief Justice was in the majority in every single case.[192]

Originalism

These are just some of the cases that caused originalists to charge the Warren Court with judicial activism. While criticism of the Warren Court existed before the creation of originalism, other critics – such as Alexander Bickel – did not label the Court as an activist court.[193] A distinction must be made between criticism of the Court and an accusation of judicial activism. It is one thing to question an interpretive method used by the Supreme Court as Bickel does.[194] It is something quite different to accuse the Court of judicial activism because an activist label implies – by both Schlesinger and Bork's definitions – that the Court found a way to interpret the Constitution in order to reach a pre-determined outcome which conformed to the Justices' preferences.

The notion that the Warren Court had rendered extra-constitutional interpretations certainly existed before originalism came to prominence. Originalists, though, accused the Warren Court of rendering expedient decisions that had no Constitutional basis. Originalists then put forward their own plan, originalism, which they purported would

[191] *Griswold v. Connecticut*, 381 U.S. 479 (1965)
[192] Schwartz, 580
[193] As mentioned in the first chapter, originalism came into existence as a reaction to decisions rendered by the Warren Court.; Whittington, "The New Originalism"
[194] Bickel, Alexander. *Politics and the Warren Court.* New york: Da Capo Press, 1973.; Bickel, Alexander M. *The Least Dangerous Branch: The Supreme Court at the Bar of Politics*. New Haven: Yale Unversity Press, 1986; Bickel described what constituted activist behavior and associated it with judicial review. As will be discussed in this section, originalists link activism to deviating from established constitutional principles.

force a judge to focus on *interpretation* instead of reaching his or her desired *outcome*. However, originalism advances a jurisprudential theory that would have the same effect. In other words, by employing originalism the Court will inevitably reach an *outcome* that is desirable to originalists. Mary E. Becker has argued that the Constitution and the Bill of Rights "serves the interests of those most like its drafters: relatively elite white men who tend to own more than their share of 'property.'"[195] Therefore, an originalist interpretation could effectively be used to render the Constitution useless for the vast majority of Americans.

The interpretive method and critiques of the Warren Court associated with originalism were brought to the forefront of controversy, in the American public, with the nomination of Robert Bork to the Supreme Court by President Reagan. Bork is closely associated with an older form of originalism; one that claims deference to legislatures while searching out the intent of the Founders.[196] However, as originalism itself was critiqued, a new originalism, which can be characterized as an affirmative jurisprudence that focused on the "… traditional… understandings of the scope of delegated powers,"[197] emerged. When one examines originalism, however, one can begin to see clear problems with it – both old and new – as an interpretive method.

Whittington portrayed new originalism as a system that sought to interpret, as opposed to construct, the Constitution, while Gillman asserted that new originalism was a

[195] Becker, Mary E. "The Politics of Women's Wrongs and the Bill of 'Rights': A Bicentennial Perspective." *The University of Chicago Law Review,* 1992: 453-517.
[196] Whittington, "The New Originalism"
[197] Gillman, Howard. "Political Development and the Origins of the 'Living Constitution'." 2007: 9. (http://www.acslaw.org/files/Gillman-Vanderbilt%20Paper%209-2007.pdf)

return to a more traditional method of interpretation an example of which can be found in Justice Sutherland's dissenting opinion in *Blaisdell*.[198] Regarding how judges ought to interpret the Constitution, Whittingon wrote:

> "… constitutional construction cannot claim merely to discover a preexisting, if deeply hidden, meaning within the founding document. It employs the 'imaginative' vision of politics rather than the 'discerning wit' of judicial judgment… Interpretation is the translation of the constitutional text into the specifically useful formulas within which a given fact situation can be fit. In order to interpret the founding document, it must be taken not simply as constituting a nation but as establishing rules for its future governance. Its history within this context is a history of specification, or replacing a relatively sparse collection of general terms with a vast corpus of constitutional law… Constitutional interpretation is essentially legalistic, but constitutional construction is essentially political."[199]

Whittington seemed to assume that the distinction between legalism and politics is an easy one to make.[200] It is interesting that in a work which purports to establish a legitimate framework for when judicial review should occur, Whittington never mentions

[198] Whittington, "The New Originalism*";* Gillman, p.9
[199] Whittington, pp.5-7
[200] As shown in the first chapter, Martin Shapiro has argued that law and politics are intertwined. Alexander Bickel argued that it is extremely difficult to separate the two in *Politics and the Warren Court.*

Marbury v. Madison.[201]

Another decision Whittington has written about and characterized as political, is *Dred Scott v. Sandford*.[202] Gillman, however, has noted that both the majority and dissenting opinions, in this case, made an appeal to the intent of the Founders.[203] Whittington's assault on the *Dred Scott* decision was focused, oddly enough, on Chief Justice Marshall's opinion in *McCulloch v. Maryland* where Marshall, according to Whittington, essentially declared a doctrine of judicial supremacy. Whittington argued that the doctrine of judicial supremacy set a legal foundation for a future Supreme Court to render the horrific decision in *Dred Scott* which overturned the Missouri Compromise of 1850 and effectively barred Congress from reaching any future compromise over the issue of slavery, both its existence and its diffusion into western territories. Whittington maintained that the Court simply should not have gotten involved and left the decision regarding the future of slavery to Congress.[204]

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[201] *Marbury v. Madison,* 5 U.S. 137 (1803); *Marbury v. Madison* established the practice of judicial review. History's account of the case is an essentially political one where Chief Justice Marshall was concerned that if he had issued a *writ of mandamus* to appoint Marbury to his post, President Thomas Jefferson would have simply disregarded it. That would have placed a burgeoning Supreme Court – not quite sure of its role under the new Constitution – in a precarious position. One could easily argue that Marshall interpreted the Constitution in a legalistic way for political reasons – one of them being the preservation of the Supreme Court as an institution. Simply put, the distinction between politics and legalism in Supreme Court decisions is not always an easy one to make.

[202] Whittington, Kieth E. "The Road Not Taken: Dred Scott, Judicial Authority and Political Questions." *The Jounral of Politics,* 2001: 365-391.

[203] Gillman, p.4

[204] Whittington, "The Road Not Taken."; Many of the same criticisms where made of the Warren Court because his decisions were seen as an intrusion on federalism; See Bork, *The Tempting of America;* While Bork begrudgingly accepts that *Brown* was the right decision, he also thought that the Court should not have inserted itself into the internal affairs of the states. After all, if the people were unhappy, Bork contended that they were at liberty to move.; Bork, pp.52-53

When Whittington referred to *McCulloch* as a political decision, he was implicitly arguing that judicial construction occurred. However, some distinctions must be made between *McCulloch* and *Dred Scott.* First, in *McCulloch*, the Court was upholding federal law while overturning state law. The State of Maryland had argued that the creation of a national bank was unconstitutional. The Court sided with the national government and stated:

> "The government of the Union, though limited in its powers, is supreme within its sphere of action… The sound construction of the Constitution must allow to the national legislature that discretion, with respect to the means by which the powers it confers are to be carried into execution, which will enable that body to perform the high duties assigned to it, in the manner most beneficial to the people… If the end be legitimate, and within the scope of the constitution, all the means which are appropriate, which are plainly adapted to that end, and which are not prohibited, may constitutionally be employed to carry it into effect."[205]

As in *Marbury*, in *McCulloch*, Chief Justice Marshall set up a framework – or a formula – that presented a hierarchy of laws and a hierarchy of sovereigns. Additionally, the Court appealed to the Constitution – as a written document – to render its decision. Finally, the Court signaled that a power does not have to be expressly delegated to the federal government in order for the government to erect institutions that benefit the American people.

[205] *McCulloch v. Maryland*, 17 U.S. 316 (1819)

Conversely, in *Dred Scott*, Chief Justice Roger Taney overturned a federal statute. In his decision, Taney appealed to Marshall's established hierarchy to overturn the Missouri Compromise by asserting that it deprived citizens of their Fifth Amendment rights by taking property without compensation when it forbade slavery in free territories. Taney wrote:

> "The change in public opinion and feeling in relation to the African race, which has taken place since the adoption of the Constitution, cannot change its construction and meaning, and it… must be construed and administered now according to its true meaning and intention when it was formed and adopted… It is not the province of the court to… decide upon the justice or injustice, the policy or impolicy, of these laws. The decision of that question belonged to the political or law-making power; to those who formed the sovereignty and framed the Constitution. The duty of the court is, to interpret the instrument they have framed, with the best lights we can obtain on the subject, and to administer it as we find it, according to its true intent and meaning when it was adopted… We think they (slaves) are not (constituent members of this sovereignty), and that they … were not intended to be included, under the word "citizens" in the Constitution…"[206]

Taney further argued that the Constitution did not expressly delegate to Congress the authority to forbid slavery in the western territories. Taney's decision – at a minimum – undermined Marshall's framework of national supremacy as presented in *McCulloch*, and

[206] *Dred Scott v. Sandford*, 60 U.S. 393 (1857)

retroactively said that Maryland – at least in principle – was correct in its interpretation of delegated constitutional powers. Furthermore, Taney seemed to be setting up his own framework – or formula – to give legitimacy to the law and the lawmakers. However, he was really setting up a formula to support the *intentions* of laws and lawmakers – not the laws or the lawmakers themselves.

Like the decisions in *McCulloch* and *Dred Scott,* Bork's originalism sets up a similar framework and has been described by O'Neill as a "legal positivist theory of law with a more formalist approach to adjudication than had been current since the rise of legal realism."[207] While the old originalism tried to discern the intent of constitutional clauses or amendments, the new originalism claimed that the Founders established certain principles in the Constitution when it delegated powers to the national government. If the federal government only used the powers that were delegated to it, it would be - according to originalists - less likely to intrude in the affairs of states or pass legislation that could potentially harm property owners. While it is certainly true that the Constitution establishes federalism and protects private property, it does not say to what degree federalism exists nor does it say that private property rights are absolute. Therefore, it is not always clear where federal power ends and state power begins. When new orginialists established fixed boundaries for the federal government which are not present in the Constitution they did so based on what they thought the Founders wanted those boundaries to be. Therefore, labeling any type of originalism as being a "legal

[207] O'Neill, p.326

positivist theory of law with a more formalist approach to adjudication" is somewhat of a misnomer.

No matter how one defines legal positivism, one of its trademarks is that the law is not hidden and that is comes from people. Formalism is a system that judges use to give legitimacy to law and lawmakers and commonly supports positivism. However, the *intentions* of some lawmakers does not a law make and using the *intentions* of lawmakers is the equivalent of creating law by virtue of looking into a crystal ball. It would be more correct to acknowledge originalism as a faux positivism that is reinforced by a framework that originalists - not lawmakers - create. Furthermore, this type of formalism, as interpreted by originalists, is in direct contradiction to what formalism is supposed to do because it undermines the legitimacy of current lawmakers whose laws do not conform to the *intentions* or *established principles* of the Founders.

In the United States, a hierarchy of law exists and some laws rank higher than others which – when there is a conflict of the two – will result in one law being rendered unconstitutional and one law being allowed to stand such as *McCulloch v. Maryland* or *Brown v. Board of Education*. The Warren Court's decision, in *Brown*, can be seen as engaging in the same framework of national supremacy that is present in *McCulloch*. Whereas Marshall and Warren were appealing to an established hierarchy, originalists seem to want a balancing act or sharing of power between the states and the federal

government to occur.[208] Again, there is no Constitutional provision that states the degree to which power sharing must occur. Furthermore, concerning the Warren Court, the Fourteenth Amendment expressly forbade states from engaging in discriminatory practices. Therefore, the decision to allow a law to stand should not be made based on *intentions* that only some people can – by reading selective documents with selective purposes – see. Furthermore, Michael Dorf has argued that originalists tend to look only at evidence that supports their interpretation which can be described as a narrow interpretation based on the Framers' intentions of the Constitution while disregarding evidence that supports a broad interpretation.[209]

When discussing whether the Fourteenth Amendment was intended to eradicate segregation in public schools, Bork looked to the state of public schools in individual states and the District of Columbia and reasoned that because segregation was occurring there and did not stop after the passage of the Fourteenth Amendment, those who ratified the amendment must not have intended for segregation in public schools to cease. However, this narrative completely fails to take into account that Congress passed a slew of civil rights legislation between 1866 and 1875 that was designed specifically to eradicate racial discrimination.[210] S.G.F. Spackman contended that "the Civil Rights Act

[208] Chief Justice Taney's decision in *Dred Scott* seems to indicate power sharing between individuals and the national government at the expense of state sovereignty by elevating the property rights of individual slave owners over the rights of the state to determine whether or not it wanted slavery.
[209] Dorf, Michael C. "Equal Protection Incorporation." *Virginia Law Review,* 2002: 951-1024.
[210] Bork, pp. 74-84; Brinkley, pp. 411-440

of 1875, was intended to spell out in specific terms the procedural guarantees of the Thirteenth and Fourteenth Amendments…"[211] The Civil Rights Act of 1875 stated:

> "… all persons within the jurisdiction of the United States shall be entitled to the full and equal enjoyment of the accommodations, advantages, facilities, and privileges of inns, public conveyances on land or water, theaters, and other places of public amusement; subject only to the conditions and limitations established by law, and applicable alike to citizens of every race and color, regardless of any previous condition of servitude… That the… courts of the United States shall have exclusively of the courts of the several States, cognizance of all crimes and offenses against, and violations of, the provisions of this act . . ."[212]

In 1883, the Supreme Court ruled that the Civil Rights Act of 1875 was unconstitutional. The Court stated that the federal government lacked the authority to compel private citizens to cease discriminatory practices.[213] Whether the federal government had this authority or not belies the point that it clearly intended to force the cessation of discriminatory practices at the state level and gave the authority to federal courts, which includes the Supreme Court, to do just that.

Whittington looked to *McCulloch* and *Dred Scott* in order to show how a judge should not interpret the Constitution. Those decisions had political and legal

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[211] Spackman, S.G.F. "American Federalism and the Civil Rights Act of 1875." *Journal of American Studies,* 1976: 313.

[212] Civil Rights Act of 1875; Text was found at – Public Broadcasting Service. *Reconstruction: The Second Civil War.* December 19, 2003. http://www.pbs.org/wgbh/amex/reconstruction/activism/ps_1875.html (accessed February 18, 2013).

[213] *Civil Rights Cases,* 109 U.S. 3 (1883)

consequences, as did decisions rendered by the Warren Court and every other Court in American history. Judges must give decisions in tough cases, and – as Laurence Tribe wrote – originalism would allow the Court to "… abdicate responsibility for the choices that constitutional courts *necessarily* make."[214]

The idea that looking to the intentions of Founders can save judges from this duty or insulate their decisions from political consequences is false. Furthermore, appeals to the Founders' or ratifiers' intent can miss valuable evidence. This was the case regarding school desegregation. Originalists focused on the fact that many of the representatives who voted for the Fourteenth Amendment had states with segregated schools and that Congress itself established segregated schools in the District of Columbia as evidence that integrated schools fell outside the scope of the Fourteenth Amendment. The Warren Court looked to debates that were had by the thirty-ninth Congress and the Civil Right Act of 1866 which was passed, along with the Fourteenth Amendment, by the same Congress.[215] However, when both originalists and the Warren Court appealed to the ratifiers' intent regarding school segregation, they completely missed the Civil Rights Act

[214] Tribe, p.56; In his book, Whittington stated, "I have… chosen to avoid the detailed discussion of cases. It is an integral part of my approach that interpretive results are separate from interpretive methods."; Whittington, *Constitutional Interpretation,* p.xii; As Tribe contended, it is much easier to create an interpretive method that is based on abstract principles when one does not have to concern oneself with the concrete consequences of that interpretive method.

[215] In his book, *Politics and the Warren Court*, Bickel inserts the historical material he collected for the Supreme Court as a law clerk for Justice Frankfurter during the Court's deliberations in *Brown*. This material never mentions the Civil Rights Act of 1875 which means the Warren Court did not consider it while making its decision.

of 1875.[216] Certainly, the Congress that passed the Civil Rights Act of 1875 was a different Congress that passed the Fourteenth Amendment but both sessions of Congress occurred during Reconstruction, and one of the aims of Reconstruction was to create a more just society for newly freed slaves.[217] The larger point, however, is that originalism can neither protect Supreme Court decisions from entering the political fray nor can it assure that *all* evidence of Framers' or ratifiers' intent will be considered when the Court renders a decision.

Additionally, there is no evidence that the Founders desired future generations to make decisions based on their intent. There is, in fact, evidence that suggests the Founders never anticipated that future generations would be beholden to their intentions.[218] Furthermore, scholars have noted that the embodiment of abstract principles contained in the Constitution is proof that the Founders envisioned a living Constitution that changed and adapted to each generation.[219]

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[216] It must be noted that the Civil Rights Act of 1875 had a provision that compelled school integration. However, this provision was removed in order to ensure its passage. It is my contention that the removal of this provision had less to do with the intent of the Congress and more to do with the fact that time was of the essence. During the election of 1874, Democrats won control of the House of Representatives. Republicans in Congress knew their time was limited and moved to pass the best legislation they could with their remaining time.

[217] Brinkley, pp. 411-440

[218] H. Jefferson Powell. "The Original Understanding of Original Intent." *Harvard Law Review,* 1985: 885-948.

[219] Tribe, Laurence H. *God Save This Honorable Court: How the Choice of Supreme Court Justices Shape Our History.* New York: Penguin Group, 1985.; Dworkin, Ronald. "The Arduous Virtue of Fidelity: Originalism, Scalia, Tribe and Nerve." *Fordham Law Review,* 1997: 1248-1269.

From *Dred Scott* to *Brown*: the Rejection of Intent and the Recognition of Institutionally Enforced Discrimination

In his dissenting opinion, Justice Curtis criticized Chief Justice Taney for searching out the *intentions* of the Founders instead of simply relying on the text of the Constitution. Justice Curtis wrote:

> "… it is insisted, that whatever other powers Congress may have respecting the territory of the United States, the subject of negro slavery forms an exception. The Constitution declares that Congress shall have power to make 'all needful rules and regulations' respecting the territory belonging to the United States. The assertion is, though the Constitution says all, it does not mean all -- though it says all, without qualification, it means all except such as allow or prohibit slavery. It cannot be doubted that it is incumbent on those who would thus introduce an exception not found in the language of the instrument, to exhibit some solid and satisfactory reason, drawn from the subject-matter or the purposes and objects of the clause, the context, or from other provisions of the Constitution, showing that the words employed in this clause are not to be understood according to their clear, plain, and natural signification."

Justice Curtis's excerpt from his dissenting opinion in *Dred Scott* beautifully illustrates one of the biggest problems with originalism because the Fourteenth Amendment states:

> "... No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person

of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."[220]

This amendment places no qualifiers as to when the states can decide not to extend an equal protection of the laws, and it – in fact – explicitly commands the states not to "deny any person within its jurisdiction the equal protection of the laws." While both Bork and Whittington thought that *Dred Scott* was a horrible decision,[221] the constitutional interpretive method they advanced would bring about more decisions comparable to Taney's opinion in that case because it is an interpretive method that inherently seeks out qualifiers to provisions of the Constitution.

While Chief Justice Taney was preoccupied with determining the Founders' intent regarding the citizenship status of the descendants of slaves, Justice Curtis wondered what the Founders thought about the expansion of slavery into the western territories. As both men questioned the intentions of the Framers, they came to very different conclusions.

In *Plessy*, the Court declared, "We consider the underlying fallacy of the plaintiff's argument to consist in the assumption that the enforced separation of the two races stamps the colored race with a badge of inferiority. If this be so, it is not by reason of anything found in the act, but solely because the colored race chooses to put that construction upon it."[222] The Court's assertion in *Plessy* that separate was equal complicated the purpose of the Fourteenth Amendment. How could the courts bar

[220] U.S. Const. Amend. XIV
[221] Bork, pp. 28-34 ; Whittington, "The Road Not Taken"
[222] *Plessy v. Ferguson*

discriminatory practices committed by the states when the Fourteenth Amendment had been interpreted, by the Supreme Court, to mean that states – as a matter of public policy – could separate people. The Court essentially said that discrimination was constitutional as long as the state discriminated equally, and if African Americans felt that discrimination placed them in a subordinate status then that was their own fault for *choosing to feel* that discrimination.

In *Missouri ex rel. Gaines v. Canada*, the Hughes Court stated, "The basic consideration here is not as to what sort of opportunities other States provide, or whether they are as good as those in Missouri, but as to what opportunities Missouri itself furnishes to white students and denies to negroes solely upon the ground of color."[223] As long as "separate but equal" remained the law of the land, the best – and simultaneously the worst – a black citizen could hope for was its enforcement.

Warren, in *Brown*, completely rejected the notion that one could essentially be both a separate yet equal member of society. After the Court deliberated – but before it voted – Warren said, "… the more I've read and heard and thought, the more I've come to conclude that the basis of segregation and 'separate but equal' rest upon a concept of the inherent inferiority of the colored race. I don't see how *Plessy* and the cases following it can be sustained on any other theory."[224] This statement coupled with Warren's assertion, in *Brown,* that the Court could not simply "turn the clock back to 1868 when the Amendment was adopted, or even to 1896 when *Plessy* v. *Ferguson* was

[223] *Missouri ex rel. Gaines v. Canada*
[224] Schwartz, p.86

written"[225] simultaneously rejected both schemes, in regards to the lawmakers' *intent* in previous eras – concerining the civil rights of minorities in the twentieth century – and the argument that inferiority felt on the part of African Americans was a self imposed construction, as a sufficient reason to continue their oppression. In so doing, the Supreme Court recognized that institutional oppression was not only real but that it was also enforced with the intention of creating a caste society.[226] One could argue that, in *Brown*, Justice Curtis's method of constitutional interpretation as found in *Dred Scott* was victorious.

Legacy of the Warren Court

After *Brown*, very little changed and many people wondered if the decision really had made a difference.[227] Furthermore, the opinion in *Brown* only applied to segregation in public schools, however, before the Fourteenth Amendment could function properly, the wrongs of *Plessy* had to be righted which was exactly what *Brown* did. As more challenges to end discrimination came before the Court, some people began to wonder why the Court had not issued a broader opinion, one that had the potential to ban all forms of race discrimination in *Brown.* Upon the commemoration of the fiftieth year anniversary of the *Brown* decision, Ian Haney Lopez argued that Warren had, indeed, written an opinion that called for the abolishment of a caste system – on the basis of race

[225] *Brown v. Board of Education*

[226] In his memoirs Warren wrote, "… the vast majority of people must realize by now that racial equality under law is basic to our institutions and that we will not and cannot have peace in our nation until the race issue is properly settled."; Warren, p.293

[227] Rosenberg, Gerald N. "The Hollow Hope: Can Courts Generate Social Change?" In *Courts, Judges, & Politics: An Introduction to the Judicial Process,* by Walter F. Murphy, C. Herman Pritchett, Lee Epstein and Jack Knight, 727-742. New York: McGraw-Hill, 2006.

or ethnicity – in American society.[228] In *Hernandez v. Texas,* an opinion released a mere two weeks before *Brown*, the Supreme Court stated:

> "Throughout our history differences in race and color have defined easily identifiable groups which have at times required the aid of the courts in securing equal treatment under the laws. But community prejudices are not static, and from time to time other differences from the community norm may define other groups which need the same protection. Whether such a group exists within a community is a question of fact. When the existence of a distinct class is demonstrated, and it is further shown that the laws, as written or as applied, single out that class for different treatment not based on some reasonable classification, the guarantees of the Constitution have been violated. The Fourteenth Amendment is not directed solely against discrimination due to a "two-class theory" -- that is, based upon differences between "white" and Negro."[229]

In this opinion, the Court carried on – and recognized its importance in – the tradition of protecting minorities that was started by the Hughes Court, specifically in *Carolene Products*. It further recognized that race as well as discrimination based on race was a complex issue that was constantly and continuously evolving. Finally, and most importantly, it recognized that the Fourteenth Amendment extended protections beyond those who were originally intended to be protected – which were freed black slaves after

[228] Lopez, Ian Haney. "Hernandez v. Brown." *The New York Times.* May 22, 2004. http://www.nytimes.com/2004/05/22/opinion/hernandez-v-brown.html (accessed February 28, 2013).

[229] *Hernandez v. Texas*, 347 U.S. 475 (1954)

the Civil War – again rejecting the notion that the written text of the Constitution should be governed by the Framers' or ratifiers' intent.[230]

In *Plessy*, the Court had stated that segregation by the state – or treating people differently solely on the basis of race – was constitutional thus rendering minorities, specifically African Americans, as "politically equal" but "socially unequal." The Hughes Court later demanded that the state treat all of its citizens as politically and socially equal. The Warren Court, in *Brown*, said that segregation among the citizenry by the state – "solely on the basis of race" – was unconstitutional regardless of the desire of the majority. In *Hernandez* and *Brown*, the Court completely disregarded the notion that the state could treat all of its citizens with political and social equality while segregating them. What made minorities unequal in society had nothing to do with how the state, on paper, treated them. The physical act of separating them from white society was what rendered them inferior and thus – in the consciousness of whites – unequal.[231] However, these cases dealt with discrimination on the basis of race or ethnicity. In the criminal protection and welfare cases, Warren added a second caveat to the evolution of anti-discriminatory doctrine regarding state governments and their citizens which was that they could not discriminate – in regards to criminal protections or the giving of welfare – on the basis indigence. By extending the Court's protection to those in poverty, Warren

[230] While the Supreme Court has historically and recently rejected arguments that the Fourteenth Amendment applies to women, Warren's opinion in *Hernandez* would seem to suggest otherwise.

[231] That is to say, minorities were not unequal because they were separated or segregated. They were separated and segregated because they were unequal. In other words, the inferiority of blacks, in white society, preceded the separate but equal doctrine. It was not caused by *Plessy*, but was merely reinforced by it. Segregation by order of law was simply a manifestation of white superiority.

recognized that castes in America happened not only on racial and ethnic distinctions but also on socio-economic lines.

One could argue that the Warren Court made great strides in eradicating a policy of unequal treatment on the basis of indigence by state governments. In regards to the treatment of citizens in poverty, the welfare cases were his equivalent of the Hughes Court's decision in *Missouri ex. rel Gaines* insofar as the Warren Court ruled that states had to treat all citizens as politically and socially equal. However, when it comes to indigence in the United States and the treatment of the poor by the citizenry, the country has not yet seen a decision akin to *Hernandez* or *Brown.*

During Warren's tenure as Chief Justice, the Supreme Court was labeled as an "activist court." While critics of Warren claimed that he had no legal basis to rule the way he did in many of his decisions, Warren understood that segregation was no longer acceptable in a country whose *Constitution* promised freedom from discrimination to all of its people.[232] Warren further understood that equality before the law, the distinction made in *Plessy*, did not always translate to a practice of equality. G. Edward White argued that Warren understood that intervention by the judiciary was sometimes necessary because legislatures did not always have the people's best interest in mind.[233] Furthermore, Warren understood - unlike his critics – that decisions had real impact in a concrete world which is something that originalists fail to understand.

[232] Warren, p.293
[233] White, G. Edward. "Earl Warren as Jurist." *Virginia Law Review*, 1981: 532-542.

Brown and *Hernandez* were emblematic of all cases that were discussed in this chapter. Discrimination was present in all other cases because the state had targeted certain populations it felt were not fulfilling essential obligations of good citizenship. People were targeted and denied constitutional protections because their skin was the wrong phenotype, they did not hold an appropriate place on the socio-economic ladder, they lived in the wrong place,[234] or they refused to carry out societal expectations of married couples. The only difference between *Brown* and *Hernandez* and the other cases is that discrimination had a physical manifestation of segregation that was present in *Brown* and *Hernandez* that was not present in the other cases.

[234] Mal-apportionment cases

CHAPTER IV

CONCLUSION

The Warren Court was not an activist court. In expanding civil rights and liberties it simply furthered a trend begun much earlier. This trend seems to go unnoticed because scholars usually regard the Hughes Court as an activist court in the economic sphere while ignoring major civil liberties decisions that were being rendered at that time as well. The exception to this would, of course, be a footnote in *Carolene Products*. While *Carolene Products* is an important case concerning the Court's role as a protector of minorities, it was not the only case. Furthermore, footnote four of *Carolene Products* was of unknown value at the time.

Just as G. Edward White and Barry Cushman argued that doctrinal changes had been occurring before the *switch in time* which aided in the facilitation of the regulatory state, the Supreme Court was also rendering decisions which created small, incremental changes in regards to civil liberties and civil rights. By the time Earl Warren became Chief Justice, enough incremental changes had occurred for him to create big changes. Warren was merely swept up into a trend that had commenced well before he was Chief Justice as was the Hughes Court in regards to economic regulation.

While originalists designated *Carolene Products* as the genesis of Warren Court activism, they failed to recognize the magnitude of the civil rights/civil liberties expansion that pre-dated Warren's tenure. Through this lens, it seems as though the

Court used this power sparingly until Warren became Chief Justice, but, as the Hughes Court chapter suggests, that was simply not the case. Also, the Hughes Court was limited in what it could do regarding civil rights due to *Plessy v. Fergusson* and the doctrine of "separate but equal." Furthermore, originalism – as a critique of the Warren Court and as a strand of jurisprudence itself – is unable to offer a legitimate alternative to the Warren Court's interpretive method.[235] Both society and the Constitution are continuously evolving and this was no less true during the twentieth century. Originalists have criticized the idea of a living constitution. Whether the United States has a living constitution or not is an issue for debate, however, in *Blaisdell*, the Court left no doubt that – irrespective of the living constitution – America definitely has a malleable Constitution.

As was shown in the Warren Court chapter, the United States would be a very different country today if the Court was obliged to interpret the Constitution based on an originalist interpretive method. Furthermore, in his decisions, Warren explicitly rejected an appeal to the Founders' or ratifiers' intent because he understood that an appeal to such intent would do nothing more than preserve the status quo. Warren, like Justice Breyer, understood that judges are not placed on the bench to act as historians. Rather, they are placed on the bench to adjudicate.

[235] The Warren Court chapter discussed some important cases from the nineteenth century, such as *Marbury v. Madison, McCulloch v. Maryland* and *Dred Scott v. Sandford*. This was because originalists use the constitutional principle of federalism and its erosion to call the Warren Court an activist court. I have come to the conclusion that accusations of activism leveled against the Warren Court are really just an extension of the argument that was had by the Federalists and Anti-Federalists, Hamilton and Jefferson, as well as the victorious North and the defeated South in post-bellum America carried into the twentieth century. In other words, this is an argument in which the country has been engaged since its founding.

In ending discriminatory practices, the Warren Court appealed to the same hierarchy Chief Justice Marshall did in *McCulloch*. Warren recognized the absolute primacy of the Fourteenth Amendment over the states unlike originalists, such as Bork, who favored a states' rights approach. Bork argued the Court should not have interfered with state policies because if people felt discrimination they were at liberty to move. Of course, people do not always have the means and resources to move, but that completely misses the point. The Fourteenth Amendment guarantees freedom from discriminatory practices from the states – all states – and the residents of one state should not have to move to another state in order to enjoy their constitutional protections. Furthermore, originalists seemed to not grasp the fact that the controversial decisions rendered by the Warren Court would not have been necessary had the states not been engaging in discriminatory acts.

As I neared the end of this research, I found that defining judicial activism remained a difficult task. As Kmiec wrote this is true because activism can mean different things to different people. One of the ways I attempted to circumvent this problem was by not providing my own definition of activism. When trying to question the way in which scholars have misused this term, I employed a definition of activism that was used by a specific scholar and demonstrated how this scholar's definition was faulty when applied to situations that implied activism, based on a standard that had been set by the same scholar, however the scholar failed to recognize the establishment of activism by his own standard. For example, Bork had absolutely no problem with the outcome of the cases the Hughes Court decided pre-*switch in time*. He simply does not

agree with the reasoning the Court used to reach that conclusion. Conversely, Bork disapproves of both the reasoning and the outcome of a case like *Griswold*. Bork does not see any inconsistency here because he was primarily concerned with the protection of federalism and not necessarily with the outcome as it related to the parties involved in the case. So, he would admonish some decisions harsher than others by determining their effects on federalism. While Bork scolded Warren for imposing judge made values, he was essentially putting forward an interpretive method that did the same thing by advocating an interpretive method that protected a degree of federalism he found suitable though I doubt he realized that.

When I began researching this thesis, I had hoped to compare and contrast the Hughes and Warren Court to show that the Hughes Court was somehow different from the Warren Court. If the Hughes Court was different and it was the first court to be labeled as an activist court then logic would have dictated that the Warren Court was not an activist court. However, the more I researched, the more I realized that the Hughes Court was not much different from the Warren Court. Both Courts found themselves in turbulent times in American history. The Hughes Court rendered economic activist decisions during the Great Depression and the Warren Court delivered activist decisions in the realm of civil rights and civil liberties during the Civil Rights movement. Whereas the Hughes Court stood in the way of economic progress, the Warren Court seemed to usher in new standards for civil rights and liberties. The ideological composition of the Court was the catalyst for both Courts. The Hughes Court ceased its activist behavior when Roosevelt was able to place his own justices – justices he felt would support his

policies – on the Court. While this Court deferred to legislatures on economic policy, it also continued the practice of expanding civil liberties and recognized the Court had a role to play in the protection of minorities. By the time Warren became Chief Justice, he merely carried on the tradition started by previous Courts. If Warren was simply carrying on a tradition that had begun with previous Courts, why is his Court considered to be an activist court?

The larger question addressed by this research centered on the role of the Supreme Court in American democracy. As I began to understand that the Warren Court was placed in an activist realm because of that Court's protection of minority groups, the question again changed and became: To whom is the Supreme Court beholden? Legislatures or the people? In theory, they should be one and the same. In practice, however, legislatures often employ various mechanisms to prevent the practice or effectiveness of universal suffrage. This was the whole reason the Warren Court had to render the decisions it did in *Baker* and *Reynolds.* This question, however, still did not address what activism was nor did it address whether the Warren Court was activist.

Prior to my research, I had not realized how much the concept of judicial activism, initially introduced by Arthur Schlesinger, had been influenced by originalism. Throughout my research, I chased a definition of activism which changed depending on the facts and circumstances that developed around any particular case. I eventually came to realize that, when a claim of judicial activism was made, originalists were really saying

that the authority of the sovereign had been undermined.[236] The conceptual problem with the idea of undermining the authority of the sovereign is that the Constitution never makes it clear where sovereignty lies. Does sovereignty lie with the Constitution? In the people? With the legislatures? If it lies with the legislature, does it lie with the national or state legislatures? At some point, these sovereignties will come into conflict and the Court will have to determine which sovereignty will win and which sovereignty will lose. If one believes in federalism and states' rights, then a Supreme Court that voids state laws – as the Warren Court did – may appear as an activist court. If one believes in the primacy of the national legislature, then the pre-*switch in time* Hughes Court could be perceived as an activist court. Of course the Warren Court voided state law, but it did so because it thought those laws violated the Constitution. In response to this, originalists first criticized Warren for not being deferential enough, then created principles that they argued could be found in the spirit of the Constitution but not necessarily in the written text. Whittington contended that activism would be easy to recognize because an activist decision was basically a political decision whereas an interpretive decision was essentially a legalistic one. However, all of the activist decisions covered in this thesis – from both the Hughes and Warren Courts – had political consequences. As long as the Hughes Court obstructed the New Deal poor people would continue to suffer. Had the Warren Court allowed "separate but equal" to remain the law of the land, people of color would have continued to suffer. Either way, there would have been political as well as

[236] I believe this characterization of judicial activism encompasses all five of Kmiec's definitions as well.

legal consequences. Thus, the distinction between a legal and political decision is not an easy one to make.

Chief Justice Earl Warren and his Court did nothing more than prevent the states from arbitrarily discriminating against their own citizens which is an *outcome* that was secured to the people through the Fourteenth Amendment. Therefore, any jurisprudential theory that creates a process capable of disenfranchising the people of this guaranty has no legitimate place in constitutional law and is not rightfully able to criticize a Court for ensuring that society, which includes the states, was fulfilling its constitutional obligations to all people and not just the people it likes.

One of the biggest limitations to this thesis was the lack of primary sources used in contextualizing the importance, or lack thereof, of the cases discussed. When I began this research, I had not fully realized how important these cases were going to be because I was primarily concerned with discussing judicial activism and whether or not it had been committed by the Warren Court from an abstract or conceptual standpoint. However, I soon realized that only an account of the two Courts could show the different scenarios each Court faced. The retelling of these accounts allowed me to place the Courts in their proper place historically, not only from a popular point of view, but from the stand point of changes that preceded each Court regarding changes in constitutional interpretation. I thought using secondary sources from other scholars would allow me to do this sufficiently, but I now believe that having more information from the Justices' papers, discussions they might have had among themselves, and reaction from the public

concerning their decisions would have been extremely useful in further placing these Courts in their proper historical role.

As previously stated, one of the most significant findings of this thesis, in regards to the myth of Warren Court activism, was that the Hughes Court had already begun a trend of expanding civil liberties some two decades before Earl Warren became Chief Justice. The question that still looms, at the end of this thesis, is why has the expansion of civil liberties, under the Hughes Court, gone unnoticed by both originalist and non-originalist scholars?

Scholars have challenged originalism conceptually, but I had not seen - prior to my research - a challenge to originalists applying the term of judicial activism to the Warren Court. This might be because it is very difficult to challenge an assertion of activism when the people who leveled the claim have created their own rules governing what does and does not constitute judicial activism. One must remember that the concept of judicial activism did exist before originalism, however, it was the originalists who changed what that concept was. Therefore, it is completely legitimate to question not only the reasons that existed for this conceptual change but also why the originalists thought that a change in the definition of what constituted activism was needed in the first place. It is in this question that I see an opportunity for further scholarly exploration.

BIBLIOGRAPHY

Primary Sources

Articles, Books, and Constitutional Amendments:

Bickel, Alexander M. *Politics and the Warren Court.* New york: Da Capo Press, 1973.

Bickel, Alexander M. The Least Dangerous Branch: The Supreme Court at the Bar of Politics. New Haven: Yale University Press, 1986.

Mason, Alpheus Thomas. "Has the Supreme Court Abdicated." *The North American Review*, 1934: 353-360.

Mason, Alpheus Thomas. "Judicial Activism: Old and New." *Virginia Law Review*, 1969: 385-426.

McBain, Howard Lee. "The Supreme Court and the States: Discusion." *Proceedings of the Academy of Political Science*, 1936: 58-61.

Pusey, Merlo J. *The Supreme Court Crisis.* New York: The Macmillan Company, 1937.

Schlesinger, Jr., Arthur M. "Fortune." *The Supreme Court: 1947*, January 1947, 73-79 and 201-213.

Sharp, Malcolm P. "Industry and Court." *The University of Chicago Law Review*, 1935: 119-125.

Tribe, Laurence H. God Save This Honorable Court: How the Choice of Supreme Court Justices Shape Our History. New York: Penguin Group, 1985.

U.S. Const. amend. IX

U.S. Const. amend. XIV

Warren, Earl. *The Memoirs of Cheif Justice Earl Warren.* Garden City, NY: Doubleday & Company, Inc., 1977.

Wechsler, Herbert. "Toward Neutral Principles of Constitutional Law." *Harvard Law Review*, 1959: 1-35.

Whittington, Keith E. *Constitutioncal Interpretation: Textual Meaning, Original Intent & Judicial Review*. Lawrence: University of Kansas, 1999.

Supreme Court Cases:

Adkins v. Children's Hospital, 261 U.S. 525 (1923)

A.L.A. Schechter Poultry Corp. v. United States, 295 U.S. 495 (1935)

Ashwander v. Tennessee Valley Authority, 297 U.S. 288 (1936)

Betts v. Brady, 316 U.S. 455 (1942)

Baker v. Carr, 369 U.S. 186 (1962)

Brown v. Board of Education, 347 U.S. 483 (1954)

Brown v. Mississippi, 297 U.S. 278 (1936)

Cantwell v. Connecticut, 310 U.S. 296 (1940)

Carlson v. California, 310 U.S. 106 (1940)

Carmichael v. Southern Coal & Coke Co., 301 U.S. 495 (1937)

Carter v. Carter Coal Company, 298 U.S. 238 (1936)

Chambers v. Florida, 309 U.S. 227 (1940)

Chas. C. Steward Machine Company v. Davis, 301 U.S. 548 (1937)

Civil Rights Cases, 109 U.S. 3 (1883)

De Jonge v. Oregon, 299 U.S. 353 (1937)

Dred Scott v. Sandford, 60 U.S. 393 (1857)

Fiske v. Kansas, 274 U.S. 380 (1927)

Gideon v. Wainwright, 372 U.S. 335 (1963)

Gitlow v. New York, 268 U.S. 652 (1925)

Griswold v. Connecticut, 381 U.S. 479 (1965)

Grosjean v. American Press Co., 297 U.S. 233 (1936)

Grovey v. Townsend, 295 U.S. 45 (1935)

Hague v. Committee for Industrial Organization, 307 U.S. 496 (1939)

Hale v. Kentucky, 303 U.S. 613 (1938)

Helvering v. Davis, 301 U.S. 619 (1937)

Herndon v. Lowry, 301 U.S. 242 (1937)

Hernandez v. Texas, 347 U.S. 475 (1954)

Hollins v. Oklahoma, 295 U.S. 394 (1935)

Home Building & Loan Association v. Blaisdell, 290 U.S. 398 (1934)

Johnson v. Zerbst, 304 U.S. 458 (1938)

Lane v. Wilson, 307 U.S. 268 (1939)

Louisville Joint Stock Land Bank v. Radford, 295 U.S. 555 (1935)

Marbury v. Madison, 5 U.S. 137 (1803)

McCabe v. Atchison, 235 U.S. 151 (1914)

McCulloch v. Maryland, 17 U.S. 316 (1819)

Meyers v. Nebraska, 262 U.S. 390 (1923)

Miranda v. Arizona, 384 U.S. 436 (1966)

Missouri ex rel. Gaines v. Canada, 305 U.S. 337 (1938)

Mitchell v. United States, 313 U.S. 80 (1941)

Morehead v. New York ex rel. Tipaldo, 298 U.S. 587 (1936)

National Labor Review Board v. Jones & Laughlin Steel Corp, 301 U.S. 1 (1937)

Near v. Minnesota, 283 U.S. 697 (1931)

Nebbia v. New York, 291 U.S. 502 (1934)

New State Ice Co. v. Liebmann, 285 U.S. 262 (1932)

Nixon v. Condon, 286 U.S. 73 (1932)

Norman v. Baltimore and Ohio Railroad Company, 294 U.S. 240 (1935)

Nortz v. United States, 294 U.S. 317 (1935)

Palko v. Connecticut, 302 U.S. 319 (1937)

Panama Refining Co. v. Ryan, 293 U.S. 388 (1935)

Perry v. United States, 294 U.S. 330 (1935)

Pierre v. Louisiana, 306 U.S. 354 (1939)

Plessy v. Ferguson, 163 U.S. 537 (1896)

Powell v. Alabama, 287 U.S. 45 (1932)

Railroad Retirement Board v. Alton Railway Co., 295 U.S. 330 (1935)

Reynolds v. Sims, 377 U.S. 533 (1964)

Shapiro v. Thompson, 394 U.S. 618 (1969)

Smith v. Texas, 311 U.S. 128 (1940)

Stromberg v. California, 283 U.S. 359 (1931)

Thornhill v. Alabama, 310 U.S. 88 (1940)

Twining v. New Jersey, 211 U.S. 78 (1908)

United States v. Bankers Trust Co., 294 U.S. 240 (1935)

United States v. Butler, 297 U.S. 1 (1936)

United States v. Carolene Products Company, 304 U.S. 144 (1938)

West Coast Hotel Co. v. Parrish, 300 U.S. 379 (1938)

White v. Texas, 310 U.S. 530 (1940)

Secondary Sources

Becker, Mary E. "The Politics of Women's Wrongs and the Bill of 'Rights': A Bicentennial Perpectvie." *The University of Chicago Law Review,* 1992: 453-517.

Brinkley, Alan. "Chapter 15: Reconstruction and the New South." In *American History Volume 2: From 1865: Fourteenth Edition,* 697. New York: McGraw Hill, 2012.

Brinkley, Alan. "Chapter 24: The New Deal." In *American History Volume 2: From 1865: Fourteenth Edition,* 697. New York: McGraw Hill, 2012.

Bork, Robert H. *The Tempting of America: The Political Seduction of the Law.* New York : Simon & Schuster, 1990.

Breyer, Stephen. *Making Our Democracy Work: A Judge's View.* New York: Vintage Books, 2010.

Bussiere, Elizabeth. "The Failure of Constitutional Welfare Rights in the Warren Court." *Political Science Quarterly,* 1994: 105-131.

Cover, Robert M. "The Origins of Judicial Activism in the Protection of Minorities." *The Yale Law Journal,* 1982: 1287-1316.

Cushman, Barry. *Rethinking the New Deal Court.* New York: Oxford University Press, 1998.

Culp, Jr., Jerome McCristal. "Toward a Black Legal Scholarship: Race and Original Understandings." *Duke Law Journal,* 1991: 39-105.

Dorf, Michael C. "Equal Protection Incorporation." *Virginia Law Review,* 2002: 951-1024.

Dworkin, Ronald. "The Arduous Virtue of Fidelity: Originalism, Scalia, Tribe, and Nerve." *Fordham Law Review*, 1997: 1248-1269.

Frankfurter, Felix. "Mr. Justice Roberts." *University of Pennsylvania Law Review*, 1955: 311-317.

Gillman, Howard. "Political Development and the Origins of the 'Living Constitution'." 2007: 1-9.(http://www.acslaw.org/files/Gillman-Vanderbilt%20Paper%209-2007.pdf)

Goldstein, Leslie F. "Judicial Review and Democratic Theory: Guardian Democracy vs. Representative Democracy." *The Western Political Quarterly*, 1987: 391-412.

Kalman, Laura. "The Consitution, the Supreme Court, and the New Deal." *The American Historical Review*, 2005: 1052-1080.

Keck, Thomas M. The Most Activist Supreme Court in History: The Road to Modern Judicial Conservative. Chicage: The University of Chicago Press, 2004.

King, Richard H. "Race, Equality and 'Hearts and Minds'." *The Journal of Southern History*, 2004: 309-316.

Kmiec, Keenan D. "The Origin and Current Meanings of "Judicial Activism"." *California Law Review*, 2004: 1441-1477.

Levin, Daniel. "Federalists in the Attic: Original Intent, the Heritage Movement, and Democratic Theory." *Law & Society Inquiry*, 2004: 105-126.

Lopez, Ian Haney. "Hernandez v. Brown." *The New York Times.* May 22, 2004. http://www.nytimes.com/2004/05/22/opinion/hernandez-v-brown.html (accessed February 28, 2013).

O'Neill, Johnathan. "Shaping Modern Consitutional Theory: Bickel and Bork Confront the Warren Court." *The Review of Politics*, 2003: 325-351.

O'Neill, Johnathan. *Originalism in American Law and Politics: A Constitutional History.* Baltimore: The Johns Hopkins University Press, 2005.

Newton, Jim. *Justice for All.* New York: Riverhead Books, 2006.

Peretti, Terri Jennings. *In Defense of a Political Court.* Princeton: Princeton University Press, 2001.

Powell, H. Jefferson. “The Original Understanding of Original Intent.” *Harvard Law Review*, 1985: 885-948.

Public Broadcasting Service. *Reconstruction: The Second Civil War.* December 19, 2003. http://www.pbs.org/wgbh/amex/reconstruction/activism/ps_1875.html (accessed February 18, 2013).

Rakove, Jack N. "The Origins of Judicial Review: A Plea for New Contexts." *Stanford Law Review*, 1997: 1031-1064.

Rosengberg, Gerald N. "The Hollow Hope: Can Courts Generate Social Change?" In *Courts, Judges, & Politics: An Introduction to the Judicial Process*, by Walter F. Murphy, C. Herman Pritchett, Lee Epstein and Jack Knight, 727-742. New York: McGraw-Hill, 2006.

Ross, William G. *The Chief Justiceship of Charles Evans Hughes, 1930-1941.* Columbia: The University of South Carolina Press, 2007.

Shapiro, Martin. "Juridicalization of Politics in the United States." *International Political Science Review*, 1994: 101-112.

Schiller, Reuel E. "The Era of Deference: Courts, Expertise and the Emergence of New Deal Administrative Law." *Michigan Law Review*, 2007: 399-444.

Schlesinger, Jr., Arthur M. *The Age of Roosevelt: The Politics of Upheaval 1935-1936.* Boston: Houghton Mifflin Company, 1960.

Schwartz, Bernard. *Super Chief: Earl Warren and His Supreme Court - A Judicial Biography.* New York: New York University Press, 1983.

Spackman, S.G.F. "American Federalism and the Civil Rights Act of 1875." *Journal of American Studies*, 1976: 313-328.

Strauss, David A. "Common Law Constitutional Interpretation." *The University of Chicago Law Review*, 1996: 877-935.

Waldron, Jeremy. "The Core Case Against Judicial Review." *The Yale Law Journal*, 2006: 1346-1406.

White, G. Edward. "Earl Warren as Jurist." *Virginia Law Review*, 1981: 461-551.

White, G. Edward. *The Constitution and the New Deal.* Cambridge: Harvard University Press, 2000.

Whittington, Keith. "The New Originalism." *Georgetown Journal of Law & Public Policy*, 2004: 109-119.

Whittington, Keith. "The Road Not Taken: Dred Scott, Judicial Authority and Poltical Questions." *The Journal of Politics*, 2001: 365-391.